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**Annalee Griffin d/b/a North Carolina License Plate  
Agency #18 and Robin Haybarker.**  
Case 11-CA-20479

January 25, 2006

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND  
SCHAUMBER

On June 8, 2005, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions, a supporting brief, and a supplemental brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.\*

We agree with the judge that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Kerry Haddock, Karen Michelle Haybarker, and Robin Haybarker. In adopting his decision, we emphasize that his findings are consistent with the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel bears the burden of proving by a pre-

<sup>1</sup> Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent's supplemental brief calls our attention to recent case authority.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Battista and Member Schaumber do not rely on the judge's finding that Annalee Griffin intentionally lied under oath.

<sup>3</sup> We find no merit in the Respondent's exception to the judge's conclusion that it is subject to the Board's jurisdiction. During the 12 months preceding the issuance of the complaint, the Respondent performed services valued in excess of \$50,000 for the State of North Carolina, which the Respondent has stipulated is an entity engaged in interstate commerce. Accordingly, the Respondent is subject to the Board's jurisdiction under the indirect outflow standard of jurisdiction. See *Southern Alleghenies Disposal Services*, 256 NLRB 852 (1981) (and cases cited therein), enfd. 681 F.2d 809 (3d Cir. 1982) (Table).

In determining the Board's jurisdiction, the judge inadvertently referenced a "Union." We correct this error, as there is no labor organization involved in this case.

\* We correct the judge's inadvertent spelling error in the third paragraph of the Notice by replacing the word "engaged" with "engaging."

ponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124, slip op. at 4 (2004).

The General Counsel established that the employees engaged in protected concerted activity during their August 12, 2004 meeting with Manager Annalee Griffin, in which they complained about favoritism, wages, and bonuses. See, e.g., *Needell & McGlone, P.C.*, 311 NLRB 455, 456 (1993), enfd. mem. 22 F.3d 303 (3d Cir. 1994) (employees' complaints about preferential treatment protected); see also *James Walsh Construction Co.*, 284 NLRB 319, 321 (1987) (employees' complaints about wages and favoritism protected). The employees were also engaged in protected concerted activity when they told Griffin that they were considering filing a complaint about these matters with the state Department of Motor Vehicles (DMV), for which the Respondent was a contractor. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (Section 7 protects employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship").<sup>4</sup>

<sup>4</sup> We reject the Respondent's contention that the filing of such a complaint with the DMV would not be protected because the DMV lacked control over the labor relations of its contractors. As a factual matter, although there is no evidence that the DMV routinely involves itself in the labor relations of its contractors, the record reflects that the DMV does receive and investigate customer complaints regarding its contractors' employees, and that the DMV reserves the right to involve itself in personnel matters if there is a serious problem with an employee. Further, the cases cited by the Respondent do not support its contention. The Respondent cites *Autumn Manor*, 268 NLRB 239 (1983); *Waters of Orchard Park*, 341 NLRB No. 93 (2004); and *Tradesmen Intl Inc. v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002). In each case, the employee activity in question was found not to be protected because it did not relate to employees' working conditions. By contrast, the matters at issue here—concerning wages, bonuses, and unequal treatment—were directly related to the employees' working conditions. Accordingly, the judge correctly found that the employees were engaged in protected activity when they considered taking their complaints to the DMV.

Chairman Battista rejects the Respondent's defense, but relies on a rationale different from that of his colleagues. He notes that there is no evidence that DMV involves itself in disputes between contractors and their employees. However, in his view, that does not deprive the employees herein of protection. The employees had a Section 7 right to seek such involvement, even if DMV would not become involved. See *Country Club of Little Rock*, 260 NLRB 1112, 1114 (1982) (employee's Sec.7 right not lost by filing complaint with EEOC which was without power to act upon it).

The General Counsel has also established that the Respondent harbored animus toward the employees' protected activity. The Respondent's animus was demonstrated in a written statement that it gave to the North Carolina Employment Security Commission (ESC), in which the Respondent admitted that a reason it discharged the employees was their complaints to Griffin.<sup>5</sup> Additionally, the timing of the discharges, immediately following the employees' threat to file a complaint, provides strong evidence of the Respondent's animus. See *Davey Roofing, Inc.*, 341 NLRB No. 27, slip op. at 2 (2004) (the timing of an employer's action in relation to protected activity can supply reliable and competent evidence of unlawful motivation).

Finally, we agree with the judge that the Respondent did not establish that it would have discharged the employees even in the absence of their protected activity.

<sup>5</sup> We reject the Respondent's contention that the judge erred in admitting a written statement and testimony from the unemployment compensation proceeding over the Respondent's objection that the documents were privileged under state law. The Seventh Circuit's decision in *EEOC v. Illinois Dept. of Employment Sec.*, 995 F.2d 106 (7th Cir. 1993), is persuasive authority. There, the court held that the EEOC was entitled to enforcement of a subpoena seeking a copy of a transcript from an Illinois unemployment compensation proceeding despite the state agency's claim of privilege. The court reasoned that "State privileges are honored in federal litigation only when state law supplies the rule of decision. When federal law governs, as it does here, only privileges recognized by the national government matter." *Id.* at 107. Applying this rationale, we find that the judge properly admitted the evidence that the Respondent submitted to the ESC.

We would reach the same result under *United States v. Cartledge*, 928 F.2d 93 (4th Cir. 1991), a criminal case cited by the Respondent. In *Cartledge*, the Fourth Circuit balanced the interest in enforcing a federal criminal statute against the policy considerations underlying the asserted state privilege. Here, Griffin's statements to the ESC are highly relevant to the Board's determination of whether her discharge of the three employees constituted an unfair labor practice in violation of Sec. 8(a)(1) of the Act. The asserted state privilege apparently rests on a general interest in the confidentiality of the ESC proceedings, though it appears that the ESC statute itself provides for disclosure of the proceedings in some cases. In these circumstances, we conclude that the federal interest in proscribing unfair labor practices affecting commerce outweighs any confidentiality concerns that might underlie the North Carolina ESC statute.

Last, we do not rely on *Yuker Construction Co.*, 335 NLRB 1072, 1082 (2001), cited by the judge. No exceptions were filed in that case to the portion of the judge's decision addressing the issue of the admissibility of unemployment compensation proceeding documents. Therefore, *Yuker Construction* is not considered a precedent on that point. *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999).

Chairman Battista recognizes that *Cartledge* was a criminal proceeding, and the instant case is not. However, the instant case involves the broad federal policies of the NLRA, and the strong federal interest in considering evidence that is relevant to an adjudication of the NLRA case. Absent a clear State prohibition against the use of that evidence, and a compelling State interest in preserving the confidentiality of that evidence, Chairman Battista agrees to consider that evidence in the NLRA case.

"Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), *enfd.* 942 F.2d 1140 (7th Cir. 1991). Here, the main reason offered by the Respondent for discharging the three employees is that they were disloyal when they inquired about opening a competing license plate agency.<sup>6</sup> As found by the judge, the Respondent was aware prior to August 12 of the employees' alleged disloyalty, but the Respondent did not take any action against the employees. The judge discredited the Respondent's claim that it entered the August 12 meeting with a preexisting plan to discharge the employees because of their alleged disloyalty, observing that the claim was directly contradicted by the Respondent's written statement to the ESC that Griffin decided to discharge the employees *during* the August 12 meeting. Moreover, even during the meeting, Griffin confronted the employees with their alleged disloyalty without giving any indication that they were about to be discharged. As found by the judge, it was not until after the employees stated that they were considering filing a complaint with the DMV that the Respondent told the employees that they were discharged. In these circumstances, we find that the Respondent failed to establish its affirmative defense under *Wright Line* that it would have discharged the employees in the absence of their protected concerted activity.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Annalee Griffin d/b/a North Carolina License Plate Agency #18, Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. January , 2006

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Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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<sup>6</sup> The Respondent also asserts that past performance problems played a role in the employees' discharge. The judge properly rejected this contention because it is based on discredited testimony, and because the employees were not given any verbal or written warnings for their alleged performance deficiencies. However, we do not rely on the judge's finding that the Respondent fabricated a history of negative performance notes in the employees' personnel files.

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Peter C. Schaumber,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Lisa R. Shearin, Esq.*, for the General Counsel.

*Phillip M. Van Hoy, Esq. (Van Hoy, Reutlinger, Adams & Dunn)*, of Charlotte, North Carolina, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Goldsboro, North Carolina, on April 4 and 5, 2005. The charge was filed by Robin Haybarker against Annalee Griffin d/b/a North Carolina License Plate Agency #18 (Respondent) on September 13, 2004,<sup>1</sup> and the complaint was issued on November 23. The complaint alleges that on August 12 Respondent terminated and thereafter failed and refused to reinstate Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock because they engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a corporation, provides vehicle registration and license plate services at its facility in Goldsboro for the State of North Carolina, where for the 12 months preceding the issuance of the complaint, it performed services valued in excess of \$50,000 to the State of North Carolina, an entity, as stipulated by the Respondent, that is engaged in interstate commerce. Notwithstanding Respondent's denial in its answer to the complaint, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>2</sup> As noted, the State of North Carolina is engaged in inter-

<sup>1</sup> All dates are in 2004, unless otherwise indicated.

<sup>2</sup> Respondent introduced the Board's Questionnaire on Commerce Information, R. Exh. 1. The form, which is dated "9-24-04" and covers the preceding 12 months, indicates that Respondent had no gross revenues from sales or performance of services directly to customers outside the State exceeding \$50,000; that Respondent had no gross amount of purchases of materials or services directly from outside the State exceeding \$50,000; that Respondent had no gross revenues from their sales or performance of services equal or exceeding \$50,000 to firms which directly made sales to customers outside the State and/or to customers which made purchases from directly outside the State; that Respondent had no gross revenues from sales or performance of services equal or exceeding \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, and/or retail concerns; that the gross

state commerce and the Respondent during the 12 months before the aforementioned questionnaire received between \$200,000 and \$249,999 in gross revenue from all sales or performance of service. R. Exh. 1. The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

Counsel for the General Counsel and the Respondent entered into the following stipulations:

Number 1, pursuant to subpoena request for the personnel files of employees during the period January 1, 2002, [no end date is given] the Company presented a new hire report for all of its employees with the exception of Catherine Daniel and Patricia Thomas. The Company could not locate those records.

....

Stipulation 2, . . . pursuant to subpoena request for all documents which reflect the attendance of the Employer's employees during 2004, including absences, tardies and leaving early, the Employer maintains no such documents, with the exception of the large wall calendar which was identified in the record and reflects only time requests made in advance. [Tr. 284.]

The Respondent also stipulated that Haddock is an employee within the meaning of Section 2(3) of the Act and is not a supervisor within the meaning of Section 2(11) of the Act; and that counsel for the General Counsel requested personnel files and she did not receive a personnel file on Peggy Taylor, including a new hire report, as the Company could not locate that personnel file.

Annalee Griffin received the contract to provide the involved services in Goldsboro for the State of North Carolina in 1997. Haddock, who had worked continuously since 1990 for the two previous owners of the involved license plate agency became Respondent's assistant manager. Respondent employs title specialists and renewal clerks. The former process the vehicle title documents and issue plates and registrations. The latter renew license plates, take turned in license plates, and process documents relating to insurance and taxes. Title specialists usually start out as renewal clerks and so they can also do that work. But since title specialists receive additional training, renewal clerks cannot do their work. When Annalee Griffin was at the office, Haddock did customer service. And when Annalee Griffin was not at the office, Haddock went to the bank in the morning to pick up the bank bag, proofread the previous day's paperwork to check for clerical errors and gave it to the courier, got change for the employees, and recorded who called in for time off.

In August 1999, Annalee Griffin hired her daughter, Laura Shilling, as a title specialist.

amount of Respondent's purchases did not equal or exceed \$50,000 from firms which in turn, purchased those goods directly from outside the State; and that gross revenue from all sales or performance of services equaled or exceeded \$200,000 but not \$250,000.

Annalee Griffin testified that in 2000 she had three employees leave her, namely Cynthia Hunley, Bambi Creech, and Alisa Ellis; that Haddock knew beforehand that these employees were leaving but she did not tell Annalee Griffin; that at that time, if she could get staff, she “absolutely” intended to discharge Haddock (Tr. 345); and that Robin Haybarker and Tonia Geigher were hired as title clerks to replace those who had resigned.

Robin Haybarker was hired by the Respondent as a title specialist in September or November 2000.

Karen Michelle Haybarker was hired by the Respondent as a renewal clerk in July 2001. (G.C. Exh. 18.) Previously she helped out Respondent when they were short handed. She testified that she is called Michelle. In July 2003, Michelle Haybarker became a title specialist.

Her husband, Robin Haybarker, testified that when his wife was hired as a full-time, permanent employee he had a conversation with Annalee Griffin in which he asked her if there was going to be a problem if he and his wife took time off together for vacations, etc., and Annalee Griffin said that it would not be a problem “as long as you put a notice and let me know ahead of time” (Tr. 189); that Respondent had a verbal attendance policy in that employees had to place their initials on a calendar a week before they wanted to take a day off; that some of the days on the calendar were marked with an “X” meaning that an employee could not take this day off except for a family emergency or if the employee had a doctor’s note; that the employees were not required to tell anybody about taking a day off as long as they placed their initials on the calendar 1 week ahead of the day off but if Annalee was in the office, he would sometimes tell her or Haddock; that if he took a partial day off and he told either Annalee Griffin or Haddock, he would not indicate on the calendar that it was a partial day off; that Annalee Griffin told him that Haddock spoke for her with respect to attendance; that Annalee Griffin never told him that he had to notify her as well about taking time off; and that if he had a day scheduled off on the calendar and he could not take it, he would erase his initials off the calendar.

Annalee Griffin testified that when Michelle Haybarker was hired she did have a discussion with the Haybarkers and she simply asked them not to abuse taking time off.

Haddock testified that employees would mark in the calendar when they were going to take time off by placing their initials on the calendar; that sometimes, depending on how far in advance they needed the time off, they would tell her that they were going to take leave; that Annalee Griffin never told her that if someone wanted to take time off they had to contact her; that the only time she told Annalee Griffin about someone coming in late was when Annalee Griffin came into the office; that “X” days are days employees are not allowed to take off unless it is part of an extended vacation or the employee has a doctor’s note; that there was no rule about being able to take Fridays off; that there was no rule about only one person could be off in the office on a given day; that there was no kind of a written attendance policy; that the policy was if the employee wanted to take a day off, he or she would put their initials on the calendar for that day, and if it was less than a week before, she would notify Annalee Griffin; and that Annalee Griffin never gave her

instructions with respect to taking a partial day off but she would put her initials on the calendar and also put a.m. or p.m. on the calendar.

Shilling left the Respondent in June 2003 to have a baby.

In December 2003, Annalee Griffin hired her daughter Julia Wells as a renewal clerk.

In December 2003, according to the testimony of Michelle Haybarker, Annalee Griffin, who was laughing at the time, told her and her husband Robin that Tonia Geigher, a title specialist with the Respondent, had asked Annalee Griffin how hard it was for a minority to open a license plate agency office. Robin Haybarker testified that in December 2003 Annalee Griffin told him and his wife, and possibly Haddock, that Geigher asked her what it would take for a minority to open another office; and that Annalee Griffin said that she could not believe that Geigher would ask that question.

Annalee Griffin testified that none of the License Plate Agency offices in North Carolina are earmarked to be managed only by minorities but some are in fact managed by minorities.

According to the testimony of Michelle Haybarker, in February 2004, Geigher was terminated by Annalee Griffin for missing a day which was marked “X” on the calendar. General Counsel’s Exhibit 20 is a copy of a February 27, 2004 Employment Security Commission Notice of Claim and Request for Separation Information regarding Geigher, who according to the form was terminated “2-13-04.” The response is included in the exhibit.<sup>3</sup>

<sup>3</sup> The Employer’s response reads as follows:

1. We have a large calendar (2-1/2 feet by 4 feet) on which each employee puts his/her initials with dry-erase marker when requesting time off. Certain days have an “X” already on them and on these days no one is allowed to be absent unless they are sick enough to go to the doctor or, under very special circumstances, if they have cleared it in advance with me. On Monday February 16, 2004 there was an “X” on the calendar with good reason. We all knew it would be one of the busiest days of the year. We (including Tonia Geigher) even discussed it on Friday, February 13th after work and talked about the fact that it would be one of the busiest days of the year. That Monday morning Tonia called in at about 8:15—she was due to arrive at 8:30—and spoke to Robin Haybarker, her co-worker. She advised him that she had to go with her father to Greenville and would not be coming in to work. Her mother also went on the trip, so Tonia’s presence was not essential. She had worked here for three years and was well aware of the rule—it is “engraved in stone”—if not on paper.

2. On January 13, 2004 I received a telephone call from my biggest customer complaining about Tonia’s rudeness and sarcastic attitude. She said that she was having trouble getting her employees to come to our office because they didn’t want to deal with her. I called an impromptu staff meeting to discuss the importance of good customer service. I talked about the call and stressed the fact that sarcasm and facetiousness was not going to be tolerated. Tonia asked which car dealer had called and complained. When I told her, she said something dismissive and walked out of the staff meeting. I called her to come back and she didn’t.

3. She was chronically late for work. Attached is a copy of just one page of the list kept by my assistant manager. . . .

4. Attached is additional documentation concerning customer complaints, attendance, and cash drawer shortages.

In February 2004, Shilling returned to work for the Respondent as a title clerk. She testified that when she left to have a baby she did not plan to return but she changed her plan when her mother lost an employee and needed her. Annalee Griffin testified that Shilling replaced Geigher.

On April 13, Annalee Griffin met with Robin and Michelle Haybarker and Haddock at their request. Annalee Griffin testified that during this meeting the employees raised their complaints about Wells's attendance, her sleeping at her station, and her not manning her station. The employees also raised concerns about Shilling's children sometimes being in the office. They asked Annalee Griffin if there was a different set of rules for Wells than there was for them. The employees told her that the issues they raised were increasing their workload, and the morale was low. Annalee Griffin testified that she felt that these complaints should have gone through channels, namely from the Haybarkers to Haddock, and from Haddock to her.

Michelle Haybarker testified that in the spring of 2004 the agency was extremely short handed all of the time; that Annalee's daughters, Shilling and Wells, came in late, left early, stayed out all together, and Shilling would bring her kids in and it would be difficult to concentrate and the customers would be disrupted with the children there; that one of the children was 5 years old and the other child was less than an year old; that the children came into the agency a couple of times a week and stayed anywhere from 30 minutes to a couple of hours; that she told Annalee Griffin that Wells was sleeping at her station on a daily basis; that the problems started about 1 month after Wells started working at the agency; that she discussed the situation with her husband and Haddock daily but they were afraid to say anything in that they might lose their jobs because Wells and Shilling were Annalee Griffin's daughters; that in April 2004 she, her husband, and Haddock decided that they needed to do something about the situation and they asked to speak to Annalee Griffin after work; that she, her husband, and Haddock met with Annalee Griffin and they told her that the three of them were carrying the entire office because Wells would leave her station and they had no idea where she went, Wells came late to work, left early, and stayed out all together, Shilling brought her children into work, and Shilling did the same thing as Wells in that Shilling came in late, left early, and stayed out all together; that Annalee Griffin said, "[w]hat am I supposed to do" and "Ronnie had told her not to hire Julie" (Tr. 142); and that after this meeting, the problems that she, her husband, and Haddock experienced in the work place did not change.

Robin Haybarker testified that in the late winter/spring of 2004 there were problems with Wells and Shilling in that they would either call in late, not come in at all, leave early, miss days which were marked with an "X" on the calendar, and Shilling would bring her children into the office a couple of times a week for from 30 minutes to 4 hours; that the younger one, who was not 1 year old, would cry and the older child would disrupt the employees when they were trying to wait on customers; that the problems started after Wells was hired; that he discussed these problems with his wife and Haddock almost daily; that on April 13 he, his wife and Haddock spoke to Annalee Griffin about the problems, telling her that her daughters were taking off "X" days, calling in late, not coming in at all, leaving early,

and Shilling's children were coming into the office; that Annalee Griffin said that she was having problems with Wells because she had emotional problems; that after this meeting the problems continued; that between the time Wells was hired and this meeting he told Cindy Jobe, who is a State auditor for the North Carolina Department of Motor Vehicles (DMV), that Annalee Griffin's daughters were taking off "X" days, calling in late, not coming in at all, leaving early, and Shilling's children were coming into the office; and that Jobe told him that the State does not get involved in employment issues.

Haddock testified that starting in January 2004 and continuing to spring 2004 Wells and Shilling would come in late, not come in at all, Wells would call in on "X" days, and Shilling would bring her two children to the office one or more times a week; that the children were in the office for an hour on average, and they would distract the employees; that Annalee Griffin's daughters' conduct made it frustrating for the other employees who were required to work harder as a result; that she discussed the problems with Robin and Michelle Haybarker almost daily; that Wells's conduct got progressively worse and on April 13 she asked Annalee Griffin to stay after work so that she, and the Haybarkers could discuss their concerns with her; that they told Annalee Griffin about Wells sleeping at her work station, Shilling bringing her children into the office, and how frustrating it was that they had to carry the load when Wells and Shilling were not there; that Annalee Griffin told them that Wells slept at her station because of her medication; and that after this meeting the problems discussed continued.

Shilling testified that at the time of the trial herein one of her children was 5-1/2 and the other was 21 months old.

In the spring of 2004, Respondent employed Shilling, Wells, Robin and Michelle Haybarker, and Haddock. Annalee Griffin also worked at the office an average of 4 days a week in the spring of 2004 up until the time her husband started to experience medical problems. Michelle Haybarker testified that in the spring of 2004 Annalee Griffin worked at the agency 3 or 4 days a week.

After Annalee Griffin approved Haddock's leave for April 16, she asked Haddock to work because Annalee Griffin needed to take the day off to go to a National Guard function with her husband. Haddock canceled her leave.

In late April 2004, Annalee Griffin's husband was hospitalized in Columbus, Georgia. He returned to North Carolina and then a few weeks later he had to have surgery. She was gone a lot from her business during her husband's medical problems and this lasted into May 2004. Annalee Griffin testified, when called by counsel for the General Counsel, that when her husband was in the hospital in Columbus, Georgia, with pancreatitis and double pneumonia she went to Columbus and from there she telephoned Haddock and asked her to inform the Haybarkers that they needed to reschedule their closing on a home loan because, although they had been given Friday, April 30, off for the closing, she could not work and having only three people in the office would be a "nightmare." Annalee Griffin testified that when Robin Haybarker telephoned her and told her that he and his wife were going to have to go to the loan closing, she asked him, "[w]ell, how about come back to work after the loan closing, maybe you all could each go individually, can you

come back from the loan closing', and he absolutely refused" (Tr. 26). With respect to April 30, Annalee Griffin testified that she had approved the Haybarkers to have that day off; that on April 30 the Haybarkers were scheduled for a home loan closing; that she never gave the Haybarkers a written warning for taking April 30 off; that April 30 was not designated an "X" day on the calendar used to mark days off; and that the "X," which signifies a day that cannot be taken off, is marked on the calendar a year ahead, which calendar employees use to designate time off by writing their initials on it.<sup>4</sup> In response to questions of Respondent's counsel, Annalee Griffin testified that the 1st, the 15th, and the 30th are busier than other times of the month; that just two people were going to be off on April 30; that when Robin Haybarker telephoned her back regarding April 30, "I tried to offer a compromise because I was in a pretty desperate situation, and the compromise was refused" (Tr. 70); that "[n]o" (Id.) she "did not have anybody else available to . . . [her], other than the people who normally work 40 hours a week of full-time, to come in and fill in on an occasion like that, an emergency situation" (Id.); that she then called Tonia Stevens in Raleigh, North Carolina, and advised her that the office would be short staffed on April 30; that *only three people worked on April 30*; and that on the drive back to North Carolina from Georgia she informed her husband that she was going to discharge these three employees.

Haddock testified that on April 29 Annalee Griffin, who was in Georgia, telephoned her at the office and told her to ask the Haybarkers, who were scheduled to be on leave the next day, if they would cancel their leave and come to work; that she asked Robin Haybarker who told her he could not work the next day because he and his wife were closing on a house; that Robin Haybarker asked for Annalee Griffin's cell telephone number and she assumed he telephoned her; and that *the next day, April 30, she, Shilling, Wells, and Peggy Taylor, who was a temporary renewal clerk (four people) worked.*

In response to questions of Respondent's attorney, Jobe, who has auditing and supervisory authority over the Goldsboro office, among others, gave the following testimony:

Q. And specifically, directing your attention to the Goldsboro office, what does 'properly staffed' mean? How many employees?

A. She [Annalee Griffin] has to have at least four or five employees.

Q. Does that mean four or five present or just on the payroll? Do they have to be working?

A. They have to be on the payroll.

Q. There are no requirements imposed about how many people have to staff the office on a particular day?

A. Now, she has to make sure that there's probably at least *four* on that counter. . . . [Tr. 113 and 114, with emphasis added.]

Haddock also testified that Taylor probably worked the following week in May 2004; and that Annalee Griffin was in the office the first Monday after April 30.

When cross-examined by counsel for the General Counsel Taylor eventually conceded that she worked for the Respondent as a temporary on April 30 and for part of the following week, leaving to go on vacation on May 5. She did not testify on direct that she worked for the Respondent on April 30. And at first she denied that she worked on April 30 on cross-examination. She had previously worked for the Respondent as a temporary for the month of September 2003.

Robin Haybarker testified that Annalee Griffin asked him to change the date of the closing on his house because she would not be in Goldsboro in April 30; that he told Annalee Griffin that he and his wife had signed a binding contract, people had arranged to be at the closing, and there was no way that he could change the day; that Annalee Griffin did not ask him to work a part day on April 30; that he and his wife had to get all of their belongings out of the mobile home they lived in because it was going to be moved on the following Monday; and that Annalee Griffin did not mention anything about April 30 after she returned from Georgia. On redirect, Robin Haybarker testified that their loan company wired the money to the wrong place on the day of the closing and this held things up.

Michelle Haybarker testified that an "X" day on the calendar meant that the employees could not take the day off unless they had a doctor's note or a family emergency; that when the calendar was posted in the beginning of the year it had the "X" days marked on it; that the "X" days did not change during the calendar year 2004; that Respondent did not have an attendance policy other than the "X"s; that when she wanted to take a day off she placed her initials on the calendar and would tell Annalee Griffin, if she was there, or Haddock; that generally she would mark the calendar to take time off 1 week in advance; that if she was going to take a partial day off, she would tell Annalee Griffin if she was there or Haddock; that sometimes she would place a.m. or p.m. or a half day in the box if she could fit it in; that other than "X" days there were no other days that employees were absolutely forbidden to take off; that Annalee Griffin never told her that the employees had to contact her about taking time off; that if she changed her mind about taking time off she would take her initials off the calendar; that she and her husband were scheduled to close on their house on April 30 and on April 29 Annalee Griffin called and asked them to change the closing; that Annalee Griffin was told that they had a legally binding contract and could be sued; that she and her husband did not work on April 30, she was not asked to work part of the day, and there were problems with the closing on their house in that their mortgage company wired the money to the wrong bank; and that they had scheduled a moving truck to move their furniture and belongings because the mobile home they were living in had to be moved by the following Tuesday. On cross-examination, Michelle Haybarker testified that she was not aware of any compromise offer from Annalee Griffin, she was not present during the telephone conversation between her husband and Annalee Griffin on April 29, and Annalee Griffin did not speak with her personally that day; that they could not change the date of the closing because it would

<sup>4</sup> The "X" days in 2004 are January 2, 16, and 20, February 12, 13, and 16, March 12, and 15, April 8 and 12, May 28, June 1 (and perhaps 15), July 2 and 6, none in August, September 3 and 7, October 15, November 12, 24, and 29, and December 23, 28, and 31.

be practically impossible to reschedule mortgage brokers, attorneys, real estate agents, and a seller who was waiting for his money; that the closing took about 3 hours; that lights had to be turned on, they had to be out of the mobile home by Monday, and a cable person was coming; and that she knew that Annalee Griffin was with her husband in Georgia at the time. On redirect, Michelle Haybarker testified that weekly there were days when both Wells and Shilling were out at the same time, sometimes part of the day and sometimes the whole day, and from January 2004 to August 12 a couple of days a week she, her husband, and Haddock were the only ones working at the agency.

Ralph Ronald (Ronnie) Griffin, Annalee's husband, testified that his wife arrived in Columbus, Georgia, on April 26; that he heard his wife's side of her April 29 conversation with Robin Haybarker regarding working on April 30; and that while he and his wife were driving back from Georgia she indicated to him that she did not believe that Haddock and the Haybarkers had the best interest of her office at heart, and he "urged her . . . to get rid of these folks if that was their support for their employer who paid them" (Tr. 340).

When called by the Respondent, Annalee Griffin testified that the Haybarkers declining to work on April 30 was a factor in her decision to discharge them, and at that time it was her "plan" (Tr. 351) to eventually fire them.

On May 26, the Haybarkers had their wedding anniversary. A month earlier they had indicated on the calendar that they were going to take the day off. After the initials had been on the calendar for nearly a month and the day off had been approved, Annalee Griffin asked them to change the day off because her granddaughter's *kindergarten* graduation was scheduled for that day. The Haybarkers changed their day off.

In June 2004, Annalee Griffin worked at the involved facility an average of 3 days a week because she was the State president of the License Plate Contractors Association and was working on legislation that the Association was working through the North Carolina General Assembly. Michelle Haybarker testified that Annalee Griffin worked just a few days a week in the summer of 2004.

In June 2004, according to the testimony of Michelle Haybarker, she told Jobe about the problems she, her husband, and Haddock were experiencing with Wells, Shilling, and the children being in the agency. Michelle Haybarker testified that Jobe said that the State would not get involved in personnel issues unless a customer complained and Jobe told her that they should speak with Annalee Griffin; and that she told Jobe that they had already done that. Also, Michelle Haybarker testified that she asked Jobe in June or July 2004 why the Snow Hill office had closed; and that she asked because the customers from that area had been asking her for about 6 months about the closing, and they were aggravated that they had to drive the 20 miles to Goldsboro just to get a sticker. Jobe testified that she did have a conversation with Michelle Haybarker about Annalee Griffin allowing her daughters, Wells and Shilling, to do whatever they wanted to do, including Shilling bringing her children to the office; and that she told Michelle Haybarker that she did not get involved in personnel matters.

According to the testimony of Patricia Smithson, who is one of the two License Plate Agency contractors in Wilmington, North Carolina, and whose testimony was not offered for the truth of the matter asserted but rather for Annalee Griffin's state of mind, on June 11 she was at a meeting with Annalee Griffin, who told her that she was uncomfortable being away from her office, she had three people in her employ she was not totally comfortable with, she was not comfortable with the level of service these people provided, she did not have anybody that she was comfortable with leaving as the manager in charge when she was not actually there, she wanted to be able to replace the staff members she was not comfortable with, and one was the assistant manager and the other two were a couple. On cross-examination, Smithson testified that she was not subpoenaed, she considers herself a friend of Annalee Griffin, and Annalee Griffin said that she was not comfortable when she was away from her office.

In mid-June, according to the testimony of Michelle Haybarker, she and her husband were scheduled to take their 1-week vacation. Michelle Haybarker testified that the week before their vacation Annalee Griffin asked her and her husband if they would work the following Tuesday, which would have been during their vacation week; that Annalee Griffin told them that if they would change their vacation plans, she would give them \$25 each and an extra day off; that they accepted Annalee Griffin's offer on the condition that everybody would work that week since she and her husband were rearranging their vacation; that Annalee Griffin agreed to this; that Wells came in late that week on June 15 or 16, she spoke with Annalee Griffin and then Wells left work never to return; that the next day Annalee Griffin told them that she and Wells had decided that they could not work together; and that after Wells left, Shilling continued to do the same things, namely coming in late, leaving early, and bringing in her children a couple of times a week. Robin Haybarker corroborated this testimony of his wife, pointing out that Shilling continued to take off "X" days.

Haddock testified, with respect to Wells leaving, that Annalee Griffin told her only that she and Wells discussed that it would be best that Wells not return to work. Haddock also testified that after Wells left, Shilling was still coming in late one or more times a week.

In June 2004, Annalee Griffin terminated Wells. She testified that Maria Rodriguez, who worked for the school system and was out for the summer, took Wells place on a temporary employee basis until July 29 when she returned to school. Annalee Griffin further testified that she spoke with Wells and for a time Wells improved but when Wells lapsed into her old habits she terminated her; and that Wells was terminated for her own behavior.

Robin Haybarker testified that in June or July 2004, after a customer asked him why the Snow Hill office had closed, he asked Annalee Griffin who told him that she did not know but, as pertinent, it was probably because there was not enough business.

Annalee Griffin testified that in July 2004 she worked almost every day at the involved facility because employees were gone on vacation.

In mid-July 2004, according to the testimony of Michelle Haybarker, Haddock took 1 week of vacation and Shilling was late every day and was in and out of the office on Wednesday of that week. Michelle Haybarker testified that when Shilling was not there she and her husband worked out front by themselves—just the two of them because Annalee Griffin was in and out of the office; and that since there was only her and her husband working, customers were walking out.

Shilling testified that on July 24 her mother asked her if she could handle being office manager; that this would mean that she would be promoted over Haddock; that she told her mother that the current staff would be very upset and she did not think they would work for her; and that her mother told her that it would not be a problem in that she was planning on making some changes and there would be some replacements.

Michelle Haybarker testified that after she and her husband returned from their July vacation, which they had switched from June at the behest of Annalee Griffin, she did not speak one word to Michelle Haybarker or her husband for 1 week; that Annalee Griffin was at the agency that week and for her not to say a word to them was unusual; that during the week she observed Annalee Griffin talking to someone else; that on July 30 Annalee Griffin told her and her husband why she did not talk to them the week before, namely that Annalee Griffin had a nightmare that Michelle Haybarker was killing Annalee Griffin's family and Robin Haybarker was complaining about having to clean it up; that she told Annalee Griffin that a person should know the difference between a dream and reality and this was no reason not to talk to someone for a week; that she asked Annalee Griffin if she thought whether the dream was coming from her conscience in that Annalee Griffin treated her, her husband, and Haddock differently and she reminded Annalee Griffin about a comment she made questioning whether she was living her life right; that Annalee Griffin said that she fired her daughter, Wells, for the three of them, and she told Annalee Griffin that she did not fire Wells for the three of them but rather whatever happened was between the two of them; that Annalee Griffin asked her why she hadn't told her about Wells before and she told Annalee Griffin that she was afraid that she would lose her job if she told her; and that she continued to have discussions with her husband and Haddock daily about the problems at the agency. On cross-examination, Michelle Haybarker testified that she complained to Annalee Griffin at the end of July with her husband and Haddock present about Annalee Griffin's daughter; and that on July 30 Annalee Griffin told her that it was their fault that she had to let her daughter, Wells, go, and Annalee Griffin said that she let Wells go for them, saying, "I fired my own daughter for the three of you." (Tr. 171.)

Robin Haybarker testified that on July 30 he overheard a conversation between his wife and Annalee Griffin, who had not talked to them for a week, during which Annalee Griffin apologized for her silence, explaining that she had been having nightmares that his wife was murdering her family and he was cleaning it up. He testified that his wife told Annalee Griffin that it was a dream and not reality, and that was no reason not to speak to her and her husband for a week; that his wife asked

Annalee Griffin if she thought it was her conscience; and that he neither joined the conversation nor did he hear all of it.

Haddock testified that on July 30, before the office opened, she overheard Annalee Griffin tell Michelle Haybarker why she did not talk to her the past week, namely Annalee had a nightmare that Michelle was killing her family and Robin was complaining about having to clean it up; that Michelle asked Annalee if it was her conscience; that Michelle told Annalee that she did not think Annalee was treating her, her husband, and Haddock right compared to Wells and Shilling and when Michelle asked her (Haddock) if that was correct she told Annalee "[y]es" (Tr. 250); and that Robin Haybarker was walking back and forth during this conversation. On redirect, Haddock testified that Annalee Griffin, on the Wednesday or Thursday before July 30, told her that she was having trouble looking at Michelle Haybarker and told her why, namely the dream; and that she laughed because she thought it was funny.

In August 2004, Annalee Griffin was out a lot up until August 13, and then she worked every day. Michelle Haybarker testified that, other than 1 hour, Annalee Griffin was not at the agency from August 5 to 12.

On August 2, Taylor, who was working for a temporary agency, began working at the Respondent's facility again. As noted above, she worked as a temporary for Respondent from April 30 to May 4, and for the month of September 2003. She was hired as a full-time permanent employee in November 2004. Taylor testified that she did not see Shilling's children in the office between August 2 and 12.

On August 9, Annalee Griffin had a conversation in her office with Jobe, who as noted above is a State auditor for the North Carolina Department of Motor Vehicles (DMV). When called by counsel for the General Counsel, Annalee Griffin testified that she told Jobe during the meeting that "she was looking for replacements for . . . [Haddock and the two Haybarkers]" (Tr. 21). After her meeting with Jobe, Annalee Griffin left the office for the day. According to her testimony, sometime later that day Annalee Griffin received a telephone call on her cell phone from Jobe who told her that Robin Haybarker had approached her and said he represented himself, Michelle Haybarker, and Haddock and he wanted to know how the three of them could open a second office and go into competition with her. Jobe told her that she told Robin Haybarker that she would not approve another office opening in Goldsboro. Annalee Griffin did not return to the office until August 12. In response to questions of the Respondent's counsel, Annalee Griffin testified that she told Jobe that Monday [August 9] "*I believed I was going to have to discharge the three because I didn't feel like I could discharge one or two and not all three, they were too close*" (Tr. 74, emphasis added); that DMV can influence Respondent's personnel decisions in that DMV reserves the right to tell Respondent that it has to terminate someone; and that she told her husband that she was going to discharge the three employees after Jobe told her that she was approached about the three employees getting an office of their own. Her husband did not corroborate this. In response to further questions of counsel for the General Counsel Annalee Griffin testified that *she believed that the three employees intended to try to open an office in Snow Hill but she did not think that it*



would ever happen; and that the Snow Hill office had closed about August 2003 partly because of a lack of business.

Jobe, who was subpoenaed by counsel for the General Counsel, testified that she is responsible for auditing a specified number of offices, including the involved Goldsboro office, in specified Counties of North Carolina; that she audits anything that belongs to the State, such as stickers, all of the equipment, all the inventory, and she makes sure the deposits are being made in time; that she goes to the Goldsboro office once a month; that she does not have any responsibility for labor relations in the Goldsboro office; that the State does get involved in customer complaints which are made through Raleigh, North Carolina; that a valid complaint is termed “justified” and a complaint that is not valid is termed “unjustifiable”; that during the 6 years she has audited the Goldsboro office there have been complaints against employees in that office but none were determined to be justified; that no new license plate agencies have opened up in the counties that she serves; that the State decides, based on vehicle population, whether a new office can be opened; that a contractor can give up a contract for various reasons and then that location would go up for bid; that the State conducts a financial background check to make sure that a prospective contractor has sufficient funds to start up a business; that on August 9 she had a conversation with Robin Haybarker outside the Goldsboro office in the parking lot sometime after lunch; that Robin Haybarker was helping her load something into her car but she was not sure what it was; that Robin Haybarker asked her “what it would take to open up a license plate agency in the Goldsboro area” (Tr. 105); that she told him that she would not approve another license plate agency in the Goldsboro area; that Robin Haybarker then asked her what it would take to open an office in Snow Hill, which is in Greene County; that she told him that there would be a financial background check and a criminal background check; that Robin Haybarker told her how unhappy his wife and Haddock were, indicating that Haddock “was actually looking for a job at the hospital” (Tr. 107); that she was at the Goldsboro office on August 9 for a personal reason and she did not do an audit that day; that after she spoke with Robin Haybarker, she spoke with Annalee Griffin in her office with the door shut; that after discussing her personal issues with Annalee Griffin she told Griffin that the employees were very unhappy but she did not explain why they were unhappy because she did not know the extent of it; that during this conversation she told Annalee Griffin that Robin Haybarker had asked what it would take to open a license plate agency in Goldsboro and Snow Hill; that Annalee Griffin responded that she was not surprised that the employees were unhappy; that she told Annalee Griffin that “I assumed that’s who he was asking for [himself, his wife, and Haddock] [but] . . . [Robin] never came out and said he was asking for himself” (Tr. 110, emphasis added); that “I probably told her [Annalee Griffin] that he was asking for himself . . . [t]hat’s probably what I told her” (transcript page 111, emphasis added); that Robin never actually told her he was asking for an office for himself; and that Annalee Griffin did not tell her anything else during this conversation. On cross-examination, Jobe testified that there could have been “two different conversations . . . [she] had with Annalee Griffin about Robin Hay-

barker approaching . . . [her] about the possibility of opening an office” (Tr. 113). As noted above, Annalee Griffin testified that she had two conversations with Jobe on August 9 but only one—and not two—was about Robin Haybarker asking her about opening or reopening an office; that the only time DMV gets involved in personnel matters is when someone is embezzling money or there are a lot of complaints against an employee; and that she told Annalee Griffin that Robin Haybarker told her that Haddock was looking for another job before Annalee Griffin fired Haddock. On redirect, Jobe testified that she gave an affidavit, dated November 9, to the Board which, with respect to August 9 indicates, in part, as follows:

I told [Annalee] Griffin that Robin had asked me about what it would take to open—I mean take to an open office, and then he asked if another office could be opened in Goldsboro. I told her that I told him that it would take a lot of money and that I would not approve another office in Goldsboro. I said that Robin had also inquired about the Snow Hill office being reopened, and I told Robin that the Snow Hill office was not in my territory so I could not say if it was going to be reopened. I did not tell Griffin that Robin has asked me about getting a second office in Goldsboro for himself, Michelle and Kerry because he never said that. Robin did not tell me that he was looking to open up an office of his own or that he was looking to do so with Michelle and Kerry. I only told Griffin what Robin had asked me. [Tr. 119, 120.]

Additionally, after looking at her affidavit, Jobe subsequently testified that she thought that she did audit the stickers while she was at the Goldsboro office on August 9 “[s]o that is basically considered an audit.” (Tr. 124.)

With respect to his conversation with Jobe on August 9, Robin Haybarker testified that he helped Jobe load a chair in her car; that Jobe, after some small talk, said how slow the office was that day, and it was probably because a lot of people were going on line and a lot of the offices were losing transactions because people were going on line; that he asked Jobe did the closing of the Snow Hill have anything to do with losing transactions and she responded that she really did not know because that office was not in her area; that he told Jobe that there were a lot of customers coming into the Goldsboro office who asked why that office closed and would it be opened again; that he told Jobe, “I don’t know if these customers are wanting to open it themselves or they’re just wanting to do it so they don’t have to drive all the way to Wayne County” and “Well, what does somebody have to do to open the office up” (Tr. 208, 209); that Jobe said that it takes a lot of money and politics played a big part in it as well; that at the time the Snow Hill office, which is in Green County and about 25 miles from the Goldsboro office, had been closed for about 1 year; that customers asked about the Snow Hill office at least every other day; and that some of the customers indicated that they asked because they did not want to have to drive to Wayne County to have their stickers renewed or title work done.

When called by Respondent, Annalee Griffin testified about two conversations she had with Jobe on August 9, which testimony was not offered for the truth of the matter asserted but rather for state of mind. Specifically, Griffin testified that on

August 9, after Jobe told her about some personal matters, she told Jobe that she had a plan and she was looking for people; that Jobe told her that her people told her that they were not happy; that she told Jobe that she was going to be making personnel changes; that later that day Jobe telephoned her on her cell phone and told her

you just think you've got trouble, you've really got trouble in your office . . . Robin asked me, when we were out behind the building, what it would take to open an office for them in Goldsboro. . . . I told them I would never approve a second office in Goldsboro. He asked me about Snow Hill. . . . I told him that that wasn't in my territory and that he would need to call Raleigh and they would put him in touch with the person who handled that." [Tr. 361, 362.]

According to Smithson's testimony, which was not offered for the truth of the matter asserted but rather for Annalee Griffin's state of mind, on August 11 at a meeting of the board of directors of the trade association of North Carolina License Plate Agencies, namely North Carolina Association of Motor Vehicle Registration Contractors, Inc., in Raleigh, North Carolina, Annalee Griffin told her and other people present before the Board meeting began that

she had three employees that were getting ready to probably leave en mass because they were going through the process of trying to open up a license tag agency. She was going to have to just terminate them immediately and try to get a staff together so that she could operate her office with the proper staff. [Tr. 300.]

When called by the Respondent, Annalee Griffin testified that at the August 11 board of directors meeting she spoke to the contractor in Wilson, North Carolina, Jean Fisher, about a former employee of hers, Patti Thomas, and Fisher contacted Thomas that day and an interview with Annalee Griffin was scheduled for the morning of Friday August 13.

Catherine Daniel testified that on Wednesday, August 11 she heard that there was an opening coming at the Goldsboro License Plate Agency and she telephoned Annalee Griffin who agreed to meet her on Thursday morning, August 12. On redirect, Daniel testified that she called Annalee Griffin on August 11 to see if she was truly interested in needing someone and Griffin told her that she was and they set up a time to meet on Thursday morning. When called by the Respondent, Annalee Griffin corroborated Daniel's testimony.

Daniel testified that she met Annalee Griffin at Wilbur's Barbecue on the morning of August 12 and Griffin hired her at that time, telling her that "there would *probably* be three openings coming up in her office" (Tr. 304, not offered for the truth of the matter asserted, and emphasis added); that on the morning of August 12 Annalee Griffin told her that there would be an opening for her and she accepted the position; and that before this she worked in another license plate agency, namely Branch 26 in Kinston, North Carolina, which had four full-time employees and one part-time employee. When called by the Respondent, Annalee Griffin testified that she met with Daniel at Wilbur's Barbecue, they talked for over an hour, Daniel was knowledgeable, and she hired Daniel on the spot; that an offer

to hire and the acceptance of that offer was made before she discharged the Haybarkers and Haddock; and that she telephoned Daniel the night of August 12 and told her to report for work on the morning of August 13.

On August 12, Annalee Griffin terminated Robin and Michelle Haybarker, and Haddock. She fired the Haybarkers first and a few minutes later she fired Haddock. Annalee Griffin testified, when called by counsel for the General Counsel, that she fired Haddock and the Haybarkers for disloyalty in that they did not have the best interest of the office at heart since they were trying to get another office and basically go into competition with her. According to Annalee Griffin's testimony, the Haybarkers' refusal to work on April 30 was another reason for firing the three in August 2004. Further, Annalee Griffin testified that she fired them for "[d]isloyalty and refusing to work on a day" (Tr. 27); that she had never given a written warning to either of the Haybarkers or Haddock and she could not remember ever giving them any verbal counselings; that at the August 12 meeting with the employees Robin mentioned that the morale was low in the office; that she felt that during her discussion on August 12 that Haddock and the two Haybarkers were very critical of her leadership, her management style, their salaries, and generally dissatisfied with how the office was functioning; that while their accusations during the August 12 meeting were not the only reason, she felt that she had no choice but to terminate their employment; that during the August 12 meeting Robin Haybarker told her that he was considering filing a formal complaint with the State of North Carolina and Michelle Haybarker and Haddock agreed with Robin about filing a formal complaint; that when Robin Haybarker mentioned filing a formal complaint with the State she terminated all three of the employees; that she did not terminate them for that reason but "[y]es" it was an afterthought" (Tr. 39); that the paychecks stubs she gave to Haddock and the two Haybarkers on August 12 (GC Exhs. 11, 9, and 12), respectively, do not have the "Paid Time Off" entries as does Shilling's paycheck (GC Exh. 10), for the same pay period; that she did not know why this was and she just printed them from her computer; that General Counsel's Exhibits 13, 14, and 15 are the original pay stubs for Michelle Haybarker, Haddock, and Robin Haybarker, respectively, all dated "8/12/2004," with Haddock's also including "8/5/2004"; that General Counsel's Exhibits 13, 14, and 15 show the sick and vacation time and perhaps the reason the documents she gave to the Board pursuant to its subpoena request left this information out because when she printed the information for the Board Shilling might have been treated differently by her new version of QuickBooks computer program since she was still an employee; that employees are paid once a week, on Thursdays, and they are paid in advance for the following Friday; that the August 12 paycheck to Haddock was for 40 hours but the August 12 paychecks to both of the Haybarkers was for 32 hours; that the reason that the Haybarkers were paid for 32 hours only was not that she knew that they were taking August 13 off but rather she "knew that they weren't going to be there the next day period . . . I had no intention of it" (Tr. 60); that when the August 12 checks issued neither of the Haybarkers had any sick or vacation time; that she first learned during the August 12 meet-

ing with the three employees at the end of the day that the Haybarkers were not going to take all of Friday off but rather they would be working a partial day; that General Counsel's Exhibit 16 is a check from the Respondent payable to Haddock, dated "8/20/2004" in the amount of \$9.63 which is a payment to Haddock for 1.25 hours of sick leave; that the paycheck stub for the August 20 check shows a zero balance for both sick and vacation time for Haddock; that, as indicated by General Counsel's Exhibit 14, Haddock had 9.25 hours of sick leave available on August 12; that she applied 8 hours of the Haddock's sick leave after the fact to Friday, August 13 since she had paid Haddock for 40 hours which would have included Friday, August 13 and Haddock did not work August 13 because she was terminated on August 12;<sup>5</sup> and that when she prepared the August 12 paycheck for Haddock she did not know for sure if Haddock was going to work on Friday, August 13. Annalee Griffin gave the following testimony:

Q. You didn't know for sure, but you – at the time, you had not fired her and you had her working the next day, isn't that true, when you prepared her paycheck and handed her her paycheck on Thursday, August 12th?

A. I'm trying very hard to remember what I did with that that day. [Tr. 63.]

Annalee Griffin further testified that counsel for the General Counsel subpoenaed the records of Catharine Daniel and Patricia Thomas and it appears that all that was turned over to counsel for the General Counsel was the job application for each but not their new hire form or their NC-4 or W-4 forms; that she did include these forms for every other employee whose files were subpoenaed; and that she thought that she had included these forms for Daniel and Thomas but apparently she did not. In response to a question of Respondent's counsel, Annalee Griffin testified as follows:

Q. Now, had you formed a decision, made the decision to discharge them before that meeting [August 12] ever occurred?

A. Yes, I had. I guess I held out some small hope for Kerry [Haddock]. That had been a big one. I guess I really had held out, I don't know why, some small hope there, but I gave up. [Tr. 72–73.]

Also, in response to questions of the Respondent's counsel, Annalee Griffin gave the following testimony:

Q. In the situations of these three employees, was Cindy Jobe, did she direct you to discharge the people?

A. No.

Q. Was it your decision?

A. It was my decision.

Q. Now at the time of the discharge meeting, had their final paychecks already been cut?

A. Yes.

Q. Who had done that?

A. I did.

<sup>5</sup> After applying 8 hours of Haddock's sick leave to Friday August 13, there would have been 1.25 hours of sick leave remaining. This is what the August 20 check covered.

Q. Why did you do that?

A. Because I intended to give them their check before they left that evening.

Q. Did you do so?

A. Yes. [Tr. 75.]

Further, in response to questions of the Respondent's counsel, Annalee Griffin testified that while she did not think that she told Robin Haybarker that he was being fired before he said that he intended to file a complaint with the DMV, she had already made the decision to fire him, she had already told Jobe and her husband that he was going to be fired (neither her husband nor Jobe corroborate this), and she had already cut his final paycheck; that Respondent is paid by the State per complete transaction; that when the Snow Hill office was closed by DMV, Respondent's business increased "right much." (Tr. 79); and that she could recall only giving one employee, Leslie Herring, a written warning in 1998.

Michelle Haybarker testified that she had placed her initials and her husband's initials on the calendar to be off on August 13; that she told Haddock that her father was coming to Goldsboro by bus from out of town and she did not know whether it would be a full or half day; that at the beginning of the week she had found out the bus schedule and she told Haddock that she and her husband would be off for only a couple of hours; that Haddock said that it would be fine because the Haybarkers had been off on Fridays before and Annalee Griffin, who was not there at the time, had never said anything about taking the time off; that during the week before August 9 and the week of August 9, before August 12, Annalee Griffin had been at the agency for about 1 hour to meet with Jobe; that she did not indicate on the calendar that she and her husband were taking off for less than a full day because she had never been told she had to and she had told Haddock that they would not be taking the whole day off; that there was not an "X" on the calendar for August 13; that when she put her and her husband's initials on the calendar there were no other initials on the calendar; that at the close of business on August 12 Annalee Griffin asked her, her husband, Haddock, and Shilling to stay behind; that Annalee pointed at the calendar and said that she was a little uncomfortable and she wanted to talk to them about the initials for August 13; that she told Annalee Griffin that her father was coming to Goldsboro by bus, the bus station in Goldsboro is located in a bad part of town, her husband did not want her to have to wait by herself, and they would only be away from work for a few hours; and that she then said the following:

I told her that I had written down in my own personal calendar many times that Laura, her, or Julie were out, the three of them all—all three of them, or a combination of two of the three of them, and I didn't feel that was fair, and I wasn't going to be gone the whole day, only a few hours. And she said, "I wasn't aware that you were going to be gone only a few hours." I said, "You weren't here to tell." [Tr. 155.]

Michelle Haybarker further testified that Shilling left the meeting after the subject of the calendar was over; that Annalee Griffin then said that she felt uncomfortable and Robin Haybarker asked her about what, saying that they were all adults; that Annalee Griffin then said that Jobe told her that the three

of her employees wanted to open another office and go into competition with her; that she told Annalee Griffin that they asked about Snow Hill and why it closed; that Robin Haybarker told Annalee Griffin that things were not getting any better at the agency, she had not done anything to change what was going on, Shilling was still doing the same things that she and her sister had been doing, he, his wife, and Haddock were always there and they had not been given a pay raise or bonus, and he considered filing a complaint with the State; that she nodded her head in agreement with her husband; that Annalee then asked Haddock, “[h]ow about you Kerry” (Tr. 158), and Haddock said that she had considered it; that Annalee left the gathering and went to her office; that Annalee returned and gave them their paychecks; that her husband asked why he was not paid for Friday August 13 and Annalee Griffin told him that it was his last paycheck and she needed his and his wife’s keys; that as she was leaving she told Annalee Griffin that she hoped that Annalee Griffin “has it documented” (Id.); that as she and her husband were backing their car out of the parking space, Haddock approached and told them that she also was terminated; that Annalee Griffin did not tell them on August 12 why they were fired, and Annalee Griffin did not give them anything in writing that day about why she was fired; that she assumed that on August 12 she and her husband were paid for only 4 days because she and her husband did not have any vacation time left; that Annalee Griffin did not tell them this; that her and her husband’s annual leave time had actually run out for that year; that in the past when her leave time had run out she took leave without pay; that she had not talked with her husband or Haddock about opening up a license plate agency office before she was fired; that she did not want to and they did not have the money to open an office; that she did not have health insurance and she had \$15,000 in doctor’s bills; that Annalee Griffin was aware of her health problems, the fact that she had no health insurance, and the fact that she had bills of this nature; that Annalee Griffin had loaned her husband \$2000 interest free to pay State back income taxes, and her husband had finished paying the loan in August 2003; and that during her employment with Respondent she never had any written warnings or oral counselings with Annalee Griffin, and she was not aware of any written customer complaints. On cross-examination, Michelle Haybarker testified that she had no knowledge about what her husband and Jobe talked about regarding another office; that when Annalee Griffin left the three employees to get the paychecks on August 12, she brought them right back, and she was gone just seconds; that her initials were on the calendar not to work on August 13 and she had no leave time left; that leave time accrued at the beginning of the year and the employees received two weeks, in addition to 12 or 13 State holidays, to be used for vacation or sick days; that on August 12 both she and her husband had used up all of their leave for the year; that she had used up all of her paid days off by August 12 because her father went into a rest home and she had to take care of his house and his financial situation; that her husband used all of his paid days off to help her; and that when she said to Annalee Griffin that she hoped that she had it documented she meant that Annalee Griffin just fired three people who had not done anything, had never been written up

or counseled, and she felt that Annalee Griffin was retaliating against them.

Robin Haybarker corroborated his wife’s testimony about what occurred on August 12 at the meeting with Annalee Griffin after work. He testified that they told Haddock that they were only taking a partial day on August 13 when they put their initials on the calendar; that they did not mention this to Annalee Griffin before August 12 because she was not at the facility; that they did not indicate on the calendar that they were taking a partial day on August 13; that Annalee Griffin started the meeting indicating that there was going to be a problem with both he and his wife taking Friday August 13 off; that he and his wife told Annalee Griffin that they were only taking a couple of hours, 1 hour of which would be his wife’s lunch hour, and Annalee Griffin said that she was not aware of that; that Shilling left the meeting to pick up her children at day care; that Annalee Griffin said that she felt really uncomfortable and Jobe told her that he, his wife and Haddock were trying to open up an office and go into competition with her; that he and his wife told her that was not true, people has asked why the Snow Hill office had closed, they asked Jobe why it had closed, and they had no intention of opening an office for themselves; that he brought up the complaints that they had discussed with her in April, indicating that even though Wells had left they were still having the same problems with Shilling; that specifically he told Annalee Griffin that Shilling was still taking “X” days off, leaving the office early, calling in, coming in late, bringing her children to the office, and “we [the employees] hadn’t had a bonus so far that year . . . [and] we hadn’t had a whole lot of raise that year” (Tr. 214); that he told Annalee Griffin that they had already talked with her and with Jobe about the complaints and “the only thing I know to do, . . . we’ve considered—or I have considered filing a State complaint” (Tr. 215); that his wife nodded her head in agreement and Annalee looked at Haddock and asked her if she was going to file a complaint, and Haddock said, “I’ve considered it” (Tr. 215); that Annalee Griffin then gave him his paycheck and he asked her why he was only paid for 4 days; that Annalee Griffin told him that that was his last paycheck, that he was not coming back to work Friday, and she wanted him to turn in his keys; that he did not have any leave left as of August 12; that in the past when his leave ran out, the time he took off from his job was unpaid; that as he and his wife were leaving his wife said something about, “I hope she’s got it documented”; that as he and his wife were leaving the parking lot Haddock approached them and told them she had also been fired; that Annalee Griffin did not tell him at this meeting why he was fired, and on August 12 he did not get anything in writing from her; that before August 12 he had not talked with either his wife or Haddock about opening up an office; that he did not want to open an office, and even if he did, he could not anyway because he was having financial problems, he had to borrow money from Annalee Griffin to pay his State income taxes after she received a garnishment notice, and his wife had a lot of medical bills; that did not receive any written warnings or verbal counseling’s while he worked for the Respondent; that in 2002 or 2003 there was a written customer complaint which was found to be “not justified” (Tr. 224) and Annalee Griffin did not say anything to him about this or any

other oral customer complaint; and that he was not aware of any oral customer complaint. On cross-examination, Robin Haybarker testified that the \$2000 loan from Annalee Griffin was interest free and she deducted \$25 from his weekly paycheck until the loan was paid.

Haddock testified that she was not scheduled, “not that I can remember” (Tr. 251), to be off the week of August 9; that the Haybarkers were scheduled to be off on Friday August 13; that the week before the Haybarkers asked her when Annalee Griffin was not at the office if they could have it off, and she told them that she did not see why not since there wasn’t an “X” on the calendar and they both had taken Fridays off before; that the following week the Haybarkers told her that they were just going to take a couple of hours off that Friday; that Annalee Griffin came in for one hour that Monday, August 9, and again on Thursday, August 12; that she did not tell Annalee Griffin that the Haybarkers were going to take time off on August 13 since Annalee Griffin was in the office three times since the Haybarkers’ initials had been placed on the calendar for August 13; that on August 12 after work Annalee met with her, Shilling, and the Haybarkers; that Taylor was told that she could leave because the discussion did not concern her; that Annalee told the employees that two people could not be off on a Friday; that at least five times in 2004 two people had been off on a given day and the employees asked Annalee Griffin why not on August 13; that Michelle Haybarker told Annalee Griffin that she and her husband were just taking a couple of hours off; that Annalee Griffin said that she felt uncomfortable because she heard that three of her employees wanted to open an office of their own and go into competition with her; that Michelle Haybarker said that she asked why Snow Hill had closed; that Shilling left the meeting; that Robin said that morale was still low; that she mentioned to Annalee the fact that she had Shilling write paychecks one time 4 years ago when Annalee could not get to the office, and it hurt her feelings; that Annalee said that Shilling had an accounting background; that Robin Haybarker told Annalee Griffin that he was thinking about filing a complaint and Michelle Haybarker nodded her head in agreement; that Annalee then turned to her and asked her if she was going to file a complaint and she responded that she considered it; that Annalee Griffin then gave them their paychecks and Robin Haybarker said, “I see you already took out for Friday” (Tr. 257), and Annalee Griffin told him that was his last paycheck and she needed the keys from the Haybarkers; that Annalee Griffin did not tell the Haybarkers why they were fired; that Annalee then told her that she did not perform her assistant manager duties and she wanted my keys also; that Annalee Griffin did not give her anything in writing regarding her termination; that before August 12 Annalee Griffin never told her that there were any deficiencies in how she performed her assistant manager duties; that General Counsel’s Exhibit 14 is her pay stub from August 12 and General Counsel’s Exhibit 16 is a pay stub from August 20; that the August 20 paycheck was mailed to her; that Annalee Griffin never explained to her in writing what the \$9.63 was; that she was paid on Thursdays and the following Friday was included in that paycheck; that the paycheck she received on August 12 was for a full week; that before she was fired she never had a conversation with anyone

about opening an office; that she had no intention of opening an office and she could not afford it because her husband was on disability; that she has heard customers on average once a week asking about the closed Snow Hill office; that she was not looking for work elsewhere when she was terminated on August 12; that during her employment with the License Plate Agency she has never looked for work elsewhere and that included the local hospital; that she never received any written warnings or oral counselings from Annalee Griffin; and that in 1998 there was a written customer complaint, the field supervisor told her not to worry about it, and Annalee Griffin never said anything to her about it. On cross-examination, Haddock testified that on August 12 she only had 9.25 hours of paid leave left for the year; and that she did not know how to operate QuickBooks Pro.

Daniel testified that about 7 p.m. on August 12 Annalee Griffin told her to report for work Friday August 13. On cross-examination, Daniel testified that she filled out her job application on August 13; that at the behest of Annalee Griffin, she prepared an affidavit or a statement for the Board about this matter; and that Annalee Griffin told her to write down when they had their telephone conversation, when she met her in person, and when she was hired. When asked on recross if she testified that she filled out the application on August 13, Daniel testified, “[t]he best I can remember it was the 12th or 13th one.” (Tr. 310.)

Shilling testified that she became office manager on August 12. She gave the following testimony in response to questions of Respondent’s attorney:

Q. Directing your attention to the time period up to the time when the Haybarkers and Kerry Haddock were fired, before that *in August*—when they were fired in August of 2004, did you have occasion to bring your children to the office?

A. No, sir, not while I was employed.

Q. You did not at all?

A. I mean, it was a rare occasion, a very rare occasion, and they did not stay. It was more along the lines of picking them up and my dad coming and picking them up from me. It was not a normal situation. Like if they were sick at daycare and I had to go get them, he would just come pick them up from me.

Q. How often would that happen?

A. Rarely, like maybe once every couple of months, if that.

Q. Were there ever any times when either or both your children were in that office for as long as an hour?

A. Maybe once, I don’t—I never really timed it, but it certainly wasn’t an extended amount of time.

Q. If that happened, would that have been an unusual event?

A. Yes, it would.

Q. Did you ever observe that either of your children interfered with the work of the other employees in the office?

A. No. If anything, Maggie really likes them and would draw them pictures and things like that, but she

never interfered with them while they were trying to do their job. I made sure of that.

Q. Were complaints ever given to you—made to you—that either of your children were interfering with the work of other employees?

A. Never. [Tr. 326, 327.]

With respect to what occurred at the after work meeting on August 12, Shilling testified that during the meeting Robin Haybarker said that it was after 5:30, he was off the clock, and he could say what he wanted to; and that Robin Haybarker said that he only made \$9 an hour and he should be able to do better because he knew how much her mother made. On cross-examination, Shilling testified that she did not recall Michelle Haybarker saying that Shilling and her mother had taken days off and Michelle Haybarker did not feel it was fair that she could not take a day off but she did recall Michelle Haybarker mentioning the time her mother took off. Subsequently, Shilling gave the following testimony:

JUDGE WEST: With respect to that meeting that occurred after work on the 12th of August, did the Haybarkers point out that they didn't want to take a full day off?

THE WITNESS: That was after the fact. That was—when we would write our names on the calendar, if you wanted a half day you would put half day p.m., half day a.m.. There were only initials.

JUDGE WEST: Now when you say after the fact what do you mean by that?

THE WITNESS: After mom had already brought it up. Originally there were three names on that calendar, which would have basically crippled the office. She had asked them about that. Then they said—maybe several minutes into it—that they only really needed half the day.

JUDGE WEST: There were three names on that calendar which would have basically crippled that office.

THE WITNESS: Yes, sir.

JUDGE WEST: But when this discussion occurred on August 12th hadn't one of those three names [initials] been crossed out?

THE WITNESS: It had been erased, you could still see a shadow of it.

JUDGE WEST: So there were only actually two names on the calendar at that point?

THE WITNESS: At that point, yes sir.

JUDGE WEST: Would two names have crippled that office?

THE WITNESS: On Friday the 13th, yes sir. On busy—taking two title clerks away it would have been rough. [Tr. 333, 334.]

When called by the Respondent Annalee Griffin testified that sometime earlier in the workweek beginning August 9 she saw the calendar with Haddock's and the two Haybarkers' initials on it for August 13, and the next day Haddock's initials were gone; that at that point in time she had pretty much made up her mind, she was looking for people, she had no intention of keeping them on; that all three people gone on a Friday before the 15th would be a real problem in the office as far as being able to provide customer service; and that at the time she had four

full-time employees, plus a temporary employee. With respect to the August 12 after work meeting, Annalee Griffin testified that Robin Haybarker said it is after 5:30 p.m. so I can say anything I want; that she discussed the calendar; that she brought up their inquiry into an office, and Robin said, "[Y]es, I did say that" (Tr. 365); that "[t]hen Michelle said that we were only interested, or we only wanted the Snow Hill or we were only interested in Snow Hill or something" (Id.); that Robin said how much he was earning and how much I made; that Robin brought up the fact that they had not received bonuses lately and he said that he had been thinking about filing a complaint with Raleigh; that she asked Haddock about that and Haddock said that she had been thinking about it; that she gave them their paychecks and Robin asked her why she did not pay him for Friday, he was only paid for four days; that she told him that it was because that was his last paycheck; that they got their personal belongings, gave her their keys and left; that she asked Haddock why and Haddock brought up the time 4-1/2 years ago that she had Shilling do the payroll; that "[a]bsolutely" (Tr. 367) it was her intent when she called the meeting on August 12 it was to discharge these three people; that she had already decided to do so; and that nothing said at this meeting influenced her decision to discharge these three people. Annalee Griffin gave the following testimony:

Q. The paychecks, the terminal paychecks you handed out in that meeting, had you caused them to be prepared before the meeting?

A. Yes.

Q. Was that so you could hand them out as a closing event, this is your last pay check. Was that your intent in preparing the checks beforehand?

A. Yes, it was.

Q. Who prepared those checks did you do it yourself?

A. I did that.

Q. And that was, as you discussed, the normal course that you be the person to prepare pay check?

A. Yes. [Tr. 367, 368.]

On cross-examination, Annalee Griffin testified that she does not have a no compete clause with her personnel; that she is aware that if a person wants to have a License Plate Agency, there is a credit bureau investigation; that there is a second license plate office in Wayne County, namely in Mt. Olive, which is about 20 to 25 miles from Goldsboro; that there is a license plate office in Farmville, North Carolina, which is about 30 miles from Goldsboro; that there is a license plate office in Kinston, which is about 30 miles from Goldsboro; that there is a license plate office in Smithfield which is about 30 miles from Goldsboro; and that Taylor was a temporary employee from McCain Temporaries and when she paid Taylor she had to pay her a rate of pay, plus a rate to the temporary agency, which made her salary higher than what Respondent normally paid for that position.

General Counsel's Exhibit 4 is a typed statement dated August 20 from Annalee Griffin to "To Whom It May Concern." It reads as follows:

As a private contractor for the State, I am supervised by a State employee from the Division of Motor Vehicles

who audits a number of License plate Agencies. My Field Supervisor is named Cindy Jobe.

On August 9, 2004 I got a phone call from Ms. Jobe advising me that I had a very serious problem in my office. She stated that she was approached by my employee, Robin Haybarker, while she was auditing my office that day. He told her he was representing himself and two other employees, Michelle Haybarker, and Kerry Haddock (my assistant manager.) He asked her if they could open a second office in Goldsboro in competition with my office. She told him that she would not approve of a second office in Goldsboro. She also told him that she had no problem with me or with my office. He then asked about getting them an office in Snow Hill, NC. Ms. Jobe then told them that Snow Hill is not in her area and she would not make that decision.

Mr. Haybarker also told her that Ms. Haddock was looking for work elsewhere and had applied at the hospital. *When I confronted these three employees they indicated that they had, indeed, approached Ms. Jobe about opening a second office.*

It became obvious to me that these three employees were not happy working for me and did not have the best interest of my office at heart. Because of the nature of the work done in my office, it is essential that I have loyal, honest employees.

Further, I paid Ms. Haddock to be my assistant manager. Part of any assistant manager's duty is to advise their employer of problems or potential problems in their business. Not only did she not advise me that I had this problem, she exacerbated the problem by joining in with the other two employees. It was obvious to me that Ms. Haddock had not carried out her responsibilities as an assistant manager.

When confronted with this knowledge, these three were very critical of my leadership, my management style, their salaries, and generally dissatisfied with how the office was functioning. During this conversation it became obvious that they did not have my best interest or the best interest of the office at heart. Based on this conversation and their accusations it was obvious to me that I had no other option but to terminate their employment.

No additional salary or compensation was due to either Mr. or Mrs. Haybarker. They had used their entire year of sick/vacation leave by the end of July. Ms. Haddock has been compensated for her remaining 1.25 hours of leave. [Emphasis added.]

Annalee Griffin testified that all three of the employees sought unemployment from the State of North Carolina and she prepared and submitted this written statement to the Employment Security Commission (ESC); and that since it was going to a Government agency, she wanted the statement to be accurate and complete.

General Counsel's Exhibit 5 is the transcript of the ESC hearing dated October 7 regarding claimants Karen Michelle Haybarker, Robin Haybarker, and Kerry Haddock. Ronald T. Lawrence, II, Esq. (RL) of Everett, Womble, Finan, Lawrence

& Brown, LLP, who also submitted a position statement in this proceeding and filed the answer to the complaint herein, represented Annalee Griffin (AG) at that hearing. As here pertinent, the following appears on pages 7 and 8 of the transcript:

RL: All right. When you began your conference with them [Karen Michelle Haybarker, Robin Haybarker, and Kerry Haddock] on August 12th, what was their attitude toward you? Any remarks that they made to you when you started the conversation?

AG: We started out, and Robin said it is 5:30 so anything, we are off the clock, so, anything I, I can say, I can say anything I want to and.

RL: And, I am just going to stop one second then I will let you continue. Was that conference in your office?

AG: Yes, in my office.

RL: On your business premises?

AG: On my premises.

RL: And did your understanding, and your communicated [sic] with Robin Haybarker that it was going to concern the job?

AG: Yes.

RL: It was not concerning something not related to the job?

AG: Yes.

RL: And then he made that comment?

AG: Yes.

RL: Ok. Go ahead.

AG: Okay, and uh, we discussed several things. Some problems. I asked them not to take Friday off and we got, they said that they were just going to take a half a day Friday, but their name had been on the calendar to take the whole day, and I said why didn't you tell me? And they said you weren't here, which I had taken some vacation days to take care of some doctor's appointments. And, I said, "You know my phone number, you have my email, you could contact me at any time and told me this." Then we went on and it just was like very critical of me of my management practices, the way I run the office, extremely critical of me. And it became more and more apparent that his was a hopeless situation.

RL: During the conference?

AG: During the conference.

AG: I had hopes, really, but I didn't think it was, my hopes were of much value but.

RL: Prior to the conference, had your intent at the conference been to try to work through whatever issues were concerning you?

AG: I honestly didn't think there was a way to do it. I would have liked to have. But I did not think there was a way to work through all that.

RL: *And during that conference, did you make a final decision to terminate your employee?*

AG: *I did.* [Emphasis added.]

At the trial herein Annalee Griffin gave the following testimony:

Q. And it was during that discussion with them on the afternoon of August the 12th, 2004 that you made your fi-

nal decision to terminate Robin, Michelle and Kerry. Isn't that true?

A. That was *not* when I made the final decision. [Tr. 34; emphasis added.]

General Counsel's Exhibit 19 is Respondent's position statement to the Board, which is dated October 28 and which—as indicated above—was submitted by Lawrence. As here pertinent, it reads as follows:

1. Ms. Griffin first realized she had a problem with these three employees in April of this year. Her husband was in critical condition in a hospital in Columbus, GA and the doctors there were doing all they could to keep him alive. The last thing she needed was to worry about whether the office would be covered on critical days. She called Ms. Haddock on her cell phone from Georgia and advised her that she was aware that the Haybarkers had requested leave for Friday, April 30, 2004. Fridays are almost always very busy and around the fifteenth or the last day of the month they are extremely busy. Ms. Haddock then responded that Robin Haybarker would not like it and Ms. Griffin advised her to tell him she needed them to work because she did not know when she would be able to get back to Goldsboro. Therefore, Ms. Griffin had full expectations that her assistant manager, Ms. Haddock, would sufficiently handle the matter. Later, Robin Haybarker called Ms. Griffin on her cell phone and advised that they were going to take the day off because they had made their plans and were not going to change them.

Ms. Griffin was out of state and could do nothing about it at that time – not knowing when she would be able to return to work. Ms. Griffin then had to call N.C. Division of Motor Vehicles, Ms. Tonya Stevens, a liaison, at the Director of Registration's office in the headquarters in Raleigh, and explain to her that the office would not be properly covered because two of her employees refused to give up their leave for that day. At this point Ms. Griffin realized that the Haybarkers were becoming more defiant and that her Assistant Manager, Ms. Haddock, would not support her on personnel matters, especially that involved her friends, the Haybarkers. Ms. Griffin talked with her about this when she returned to the office.

They later proved that her suspicions were correct when Robin approached Ms. Griffin's Field Supervisor, Cindy Jobe, and asked how he, Ms. Haybarker, and Ms. Haddock could get an office of their own. When Ms. Jobe told him that she would not open another office in Goldsboro, he asked about an office in the neighboring town, Snow Hill. At that time he was very critical to Ms. Jobe of Ms. Griffin, her management style, and of the office. This is only one of the many reasons they were fired. Ms. Griffin had come to the point that she just could not work with them any longer. Ms. Griffin felt that she could no longer trust them to work for the good of her business, and ultimately her customers, and the State of North Carolina. Earlier than the August, 2004 meeting, Ms. Griffin had begun a plan to terminate the three as soon as possible.

2. Ms. Griffin does allege that such is one of the reasons for the employees' termination. As stated above, other reasons contributed to her decision. The employees actions of attempting to open an office of their own was the 'last straw.' Ms. Griffin learned about the attempts of the three employees to open their own competing office from her N.C. Division of Motor Vehicles Field Supervisor, Cindy Jobe. Ms. Jobe was in her office on Monday August 9, 2004, for a routine audit. She called Ms. Griffin on her cell phone after she had left Ms. Griffin's office that afternoon. She advised Ms. Griffin that she had a real problem in her office. She said that Robin Haybarker had talked to her in the parking lot and had asked her about getting a second office in Goldsboro for himself; his wife, Michelle Haybarker, and their friend and then current assistant manager, Kerry Haddock. Mrs. Jobe told Ms. Griffin that she said she would not open a second office in Goldsboro. Robin then asked her about reopening the Snow Hill office. She advised him that Snow Hill was not in her area and that she would not be the one to make a decision on that issue. Snow Hill is only 18 miles away from Goldsboro, and a large number of the people who live in the Snow Hill area use Ms. Griffin's office. If this office were opened, it could substantially decrease the transactions to the point that she would have to reduce her staff. Ms. Griffin was especially concerned that her assistant manager was participating with two of her employees in a plan to damage both her and her office.

3. The final decision was made on Monday, August 9, 2004. Prior to that time Ms. Griffin had discussed the problems she had been having with these employees with Ms. Jobe, her field supervisor. Ms. Griffin told Ms. Jobe that she was concerned about their loyalty and their interest in their jobs. Ms. Griffin told Ms. Jobe that she knew that something was going on between the three of them and that she was very concerned. Ms. Griffin discussed the fact that they were all three going out the back door together during the work day for extended private conversations while customers waited in line. Also, she told Ms. Jobe that she had to resort to going outside to call them back in to their posts, and further that Ms. Griffin had told them not to go out there together again. Outside the back door is the designated smoking area. Ironically, Ms. Haddock does not even smoke. Why then would she leave her post to watch them smoke? After these same events occurred a second and third time, Ms. Griffin told them that such must stop. Ms. Griffin also informed Ms. Jobe that she was getting some verbal complaints because of the uncooperative attitudes these three employees were exhibiting towards the customers. Most customers are however, unwilling to make a written, formal complaint – even when advised of that right.

Before Ms. Griffin met with the Haybarkers and Ms. Haddock on Thursday, August 12, 2004, she had already interviewed and hired Mrs. Cathie Daniel, who had done the same work in a like office under the different contractor like her office in Kinston, N.C.. Also, Ms. Griffin had spoken on the telephone with Ms. Patty Thomas, who also



had experience and had done the same work in a Wilson, N.C. office. Further, Ms. Griffin had set up an interview with Ms. Thomas to take place on Friday, August 13, 2004. Ms. Griffin hired Ms. Thomas at that time.

General Counsel's Exhibit 6 are a number of documents which were given to counsel for the General Counsel by Respondent in response to a subpoena for the documents in Haddock's personnel file. They read as follows:

May, 1997

A customer failed to pay Griffin Auto Sales for the lien on her car. Upon inspection it was discovered that the lien had been left off when Kerry Haddock entered the title work. The customer was in a wreck and the insurance company paid her instead of Griffin Auto Sales because she showed a clear title.

If this were any other dealer I would be personally held liable and required to pay the balance of the loan. This work was done 5 days after I was awarded my contract. Ms. Haddock is said to be very detail oriented and it is strange that she would omit a lien on my husband's work. This will bear watching closely.

February 19, 2000

This is the first time that I have had a moment to document this event. It is so ludicrous that I hardly know how to explain it. On Jan. 26 there was over 8 inches of snow and ice on my driveway and on the street in front of my house. Since we live so far in the country we are a low priority for road clearing. My Dad died on the 27th and between that and the snow, I had not [sic] idea that I would be able to get into the office to prepare the payroll. Since my daughter, Laura, could make the trip in and she has a strong background in payroll accounting and computer accounting software, I had her to prepare the payroll and sign my name to the checks. I just wanted to make sure that everyone got paid.

A few days later Kerry came to me with a Xerox copy of her paycheck and stub. She asked me to put it into her employee file. When asked why, she stated that she knew that was not my signature on the checks and that she believed that Laura had prepared and signed her check. I asked why that bothered her so much and she said that she should have been the one to do it. This was just a few days after my Dad's death and she was bringing this petty, childish issue to me. I put the check in her folder and asked her to go back to work.

September 20, 2000

This is very hard for me to write because I have tried my best to trust Kerry Haddock. She has been involved with the crippling of my office, Bambi Creech did not show up for work one day and Kerry denied any knowledge of it. Later she said that Bambi had mentioned that she might not be in that day. However, once again, Kerry failed to advise me of an important event. After hours, Bambi came in, dropped her keys, and gave me her formal resignation. The same day, Alissa Ellis gave me her writ-

ten two weeks notice. Amazingly enough, they were almost identical right down to the blue color of the heading. Also, Bambi, and Kerry are best friends and there is no way that Kerry would not be involved in this. I have been told by Cindy Hunley, another title clerk, that Kerry is involved up to her ears. I cannot prove it, but she also said that she came in early one day and caught them in my employee files trying to find out how much Laura is paid.

Cindy also turned in her three weeks notice. When I told Kerry that I was surprised, she said that Cindy had told her weeks ago that she was going to move back to Virginia. When I asked Kerry why she did tell me any of this, she just shrugged her shoulders. There are now only three of us trying to run a six-person office. When the day arrives that I feel comfortable that I can operate this office without her, Kerry will be gone!

April 2004

After hours last week Kerry, Robin, and Michelle came to me and asked for a meeting. They began the meeting by saying "We want to know if there are a separate set of rules for Julie than everybody else." I asked them to be specific and they said that she had arrived late several times and had even fallen asleep at her station. I told them I would discuss this with Julie and try to straighten it out.

Robin did not most of the speaking. Once again, Kerry did not act the part of the supervisor and bring the problem directly to me. She let her friends do it for her. This could have been handled in a much more professional manner.

May 4, 2004

My husband spent the last week in April in the critical care unit in a hospital in Columbus, GA. I went to be with him and was there the entire last week in April.

I called Kerry on Wednesday because I knew we would not be home by Friday and Robin and Michelle had asked off for that day. I told her to tell them that I would not be back and that they could not have that day off. It was the last day of the month and sure to be very busy. Kerry said that Robin would not like it and I said that it couldn't be helped. A few minutes later Robin called me back and told me that they were taking off because it was their loan closing. I tried to compromise and said that they could take off long enough to go to the loan closing and he refused.

Once again Kerry failed to deal with the realities of her job responsibilities. When Ronnie gets back on his feet and employee vacations are out of the way Kerry will be gone!

June 5, 2004

Terry Batson of Charter Motor Sales approached me at a social event to visit and I asked him why I hadn't been seeing much of him lately. He said that Kerry had been so rude and disrespectful to him on his last few visits to my office that he had started taking most of his work to the Mount Olive office.

I asked him for details and he was very forthcoming. He brought up a visit to my office that made him so angry that he left and swore never to darken the door again. Kerry waited on him and rejected a piece of work because it was missing a signature. He went to Virginia and got the signature and brought the work back to my office where Kerry waited on him again. She refused to do the work because she said the signature had been forged. How could she know such a thing? He also brought in another piece of work that she said had problems and refused to complete it. He couldn't find anything wrong with it and took both pieces to the dealer window at DMV Headquarters. They said that both pieces were fine. He asked them to be sure of it because they had been rejected in Goldsboro. They said the work was perfect and completed it.

I apologized to him and promised him that there would soon be some big changes in my office and that he would be very happy with them.

August 9, 2004

Talked to Cindy Jobe in my office behind closed doors today. Advised her that I am looking for replacements for Kerry, Robin, and Michelle. Discussed the problems I have been having and advised her that I plan to move on this as soon as possible.

She called me on my cell phone later that day and told me that Robin had talked to her in the parking lot and advised her that he, Michelle, and Kerry wanted to know how to open a second office in Goldsboro for themselves. She told him that she would never approve another office in Goldsboro. He then asked about reopening the Snow Hill office. She said that one is not in her territory and that they would have to go through DMV to find out. He told her they were unhappy and that Kerry had applied at the hospital for a job.

She will be terminated ASAP.

August 12, 2004

Terminated Kerry, Robin, and Michelle tonight. When I asked Kerry about her involvement with their plans to hurt me and get another office, she said it was because I let Laura do the payroll in January 2000.

The above-described documents for April 2004, May 4, and August 9 and 12 were also received as General Counsel's Exhibit 7, and it was indicated that these documents were given to counsel for the General Counsel in preparation for the hearing by Respondent in response to a subpoena for the documents in Michelle and Robin Haybarkers' separate personnel files. Annalee Griffin testified that she drafted the August 9 memorandum that night on her home computer and she took the same approach with her August 12 memorandum; that none of the above-described documents referring to Haddock or the Haybarkers have the name of Annalee Griffin on them; that the "Ronnie" referred to in General Counsel's Exhibit 6 is her husband Ronnie Griffin; and that during the Board investigation herein the documents in General Counsel's Exhibits 6 and 7 were not presented to the Board because she did not think that the Board requested them. In response to a question of Respon-

dent's counsel, Annalee Griffin testified that with the Batson memorandum she was indicating that Haddock would be gone and she took this into consideration when she decided to terminate Haddock.

Terry Batson testified that he owns Charter Motor Sales, which is a used car sales company; that he has used the involved agency for about 15 years; that in the beginning of June 2004 he attended a fund raiser for Annalee Griffin; that at the fundraiser he told Annalee Griffin that he had not used her agency for a while because (1) Haddock accused him of signing a title, instead of the owner, and she would not process the papers resulting in him having to go to the Mt. Olive, North Carolina License Plate Agency office, which did process the paperwork; (2) Haddock refused to process a title, indicating that the lien release that he had from one bank failed to demonstrate that the involved lien from another bank (which apparently was bought by another bank and no longer existed) on the title had been satisfied, resulting in him having to go to the Raleigh, North Carolina License Plate Agency office, which did process the paperwork; and (3) an employee of his refused to work with Robin Haybarker; that Annalee Griffin told him that she was "sorry and that if I would bear with her she was in the process of making some changes and she said, I think you'll like these changes. So, she said just be patient with me" (Tr. 288); that he resumed using the Goldsboro office after Robin and Kerry were gone; that he has not had any customer service problems since he resumed using the Goldsboro office; and that his business is in Goldsboro, it is about 5 miles from the Goldsboro License Plate Agency, and it is about 14 miles from the Mt. Olive License Plate Agency. On cross-examination, Batson testified that he was not subpoenaed; that he uses the Goldsboro License Plate Agency about once a week; that he is friends with Ronnie Griffin, who he has known for 15 years, and Ronnie Griffin's son, James; that he never filed a written complaint with the State or with Annalee Griffin's office regarding Haddock's or Robin Haybarker's conduct; and that he did not look at any materials in preparing for the hearing herein but he did have a conversation with Annalee Griffin's attorney.

When called by the Respondent, Annalee Griffin testified that by the time she became aware of Batson's problems she had pretty much made up her mind but this "was sort of icing on the cake" (Tr. 352); and that while she formulated an intention to discharge the two Haybarkers and Haddock at least a few months before they were discharged, she was not able to carry out her intentions any earlier than she did because of her husband's illness which required his hospitalization after he was released from the hospital in Columbus, and legislative matters important to the aforementioned association.

On rebuttal, Haddock testified that she did not remember any issue about whether a signature was forged; that a Virginia title does not have to be notarized; that she did not remember an incident with Batson regarding a Maryland title and a lien release issue; and that Annalee Griffin never spoke with her about either of these alleged incidents or about any complaints that Batson raised against her.

General Counsel's Exhibit 8 are a number of documents which were given to counsel for the General Counsel by Respondent in response to a subpoena for the documents in Tonia

Geigher's personnel file, along with personnel files of Respondent's employees.<sup>6</sup> They read as follows:

February 4, 2003

RE: Verbal counseling for Tonia Geigher

Spoke with Tonia today about her cash drawer discrepancies. She was very defensive and did not want to acknowledge the problem. Advised her to keep her drawer straight and put an . . . end to the cash drawer shortages.

Annalee Griffin

August 15, 2003

Documentation on incident involving employee Tonia S. Geigher—August 14, 2003.

Ms. Geigher had been absent the previous Friday, August 8, 2003. When I prepared the payroll on August 14, I checked back as far as three weeks in my QuickBooks payroll program to see if I had charged that absence against her previous check. There was no evidence that I had, so I charged the day against her vacation leave. She came to me very angry, loud, and argumentative and demanded that I correct it. I tried to tell her that I had checked it in my payroll program and she got even louder and more argumentative. She slammed out of the back door. She was so loud that her co-workers walked to the back office to see if everything was OK.

She returned later with her pay stubs for the last three pay periods showing that I had, indeed, previously charged her for the 8 hours. I told her that I would correct it in my program but that she was never to disrespect and use that tone of voice with me again. She denied having been loud and aggressive.

This morning she told her co-workers that I am singling her out and that she is going to get to the bottom of it. I have never singled her out and never will. If she will do her job, arrive on time, manage her cash drawer, and show proper respect to management, she will have no problem with me.

Annalee Griffin

November 7, 2003

RE: Customer Complaint on Tonia Geigher

Call back number 731-7930 ask for Nate

Customer named Nate (did not want to give last name) called to complain about her condescending attitude. Said she is not receptive and makes people feel that they are nothing. Said he observed her treating others the same way. Said she would not listen to questions, rolled her eyes, and brushed him off.

I called today and spoke to this customer. He was very upset and said that I should not have an employee working with the public who treated people this bad. Said that she was very mean to an old man who was ahead of him in line. Nate was very irate and said that he had never made a call like this before but felt that this had to be done.

Annalee Griffin

December 23, 2003

Kerry told me that Julie Heath from Toyota-Mitsubishi called today. She said that she was treated very rudely by Tonia when she (Tonia) answered the phone.

I will stress again to the staff about customer service and that it extends to our telephone attitudes.

Annalee Griffin

January 13, 2004

RE: Complaint—Tonia Geigher

Received a call today from Kim Bogue, the office manager at Deacon Jones FLMK—my largest customer. She said that we have known each other long enough to be able to speak plainly and that it was very important that we continue to have a good working relationship.

Ms. Bogue proceeded to tell me that she could not get her employees to bring single pieces of work over the counter and wait for them because none of her staff wanted to run the risk of dealing with Tonia. She said that they have told her several times that they are not treated well and that they stated that she is very rude and sarcastic and makes them feel as if she thinks they are stupid.

I will have a staff meeting immediately and address this problem. I plan to address this with the office as a whole to make sure that no one else thinks that this behavior is allowed.

Annalee Griffin

Annalee Griffin testified that she terminated Geigher, who was a title specialist, because she did not come to work on a critical day which was marked with an "X" on the calendar, namely February 16, which was a very busy day; that in December 2003 Geigher approached her and asked her what it would take to open up a minority License Plate Agency office, and she told Geigher that she would have to speak with Jobe and the people in Raleigh; that Geigher is an African American; that a customer, Toyota-Mitsubishi, forwarded a letter dated March 3 regarding Geigher's conduct and she placed that letter in Geigher's personnel file; that Geigher's file has a list of tardies and absences from August 2003 until December 2003; that "[f]airly regular" (Tr. 45), she documents poor conduct or performance; that every one of the documents in Geigher's file has a day, month, and year on it and Annalee Griffin is typed on every one of the documents; that the typing on the first document, namely February 4, 2003, is different from the typing on the other pages and from the documents received as General Counsel Exhibits 7 and 6; and that the typeface on General Counsel's Exhibit 6 and 7 is identical. In response to a question of Respondent's counsel, Annalee Griffin testified that she did not consider Geigher asking her about opening a minority office to be disloyal. When called by the Respondent, Annalee Griffin testified that she also terminated Roxanne Rodriguez during her 90-day probationary period because she left for lunch one day and just did not come back, she was having family problems and didn't call.

<sup>6</sup> Wells' and Shilling's personnel files each contain a single sheet of paper which is called a hire report.

Robin Haybarker testified that sometime after he was terminated by Annalee Griffin, he filed a complaint with the director of the North Carolina DMV.

#### Analysis

Paragraphs 6 and 7 of the complaint, collectively allege that Respondent terminated the two Haybarkers and Haddock on August 12 because they engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) of the Act specifies that it “shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” Section 7 of the Act, as here pertinent, specifies “[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose . . . mutual aid or protection . . .”

The Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), indicated that “the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative . . . forums . . .” In other words, the Court concluded that the “mutual aid and protection” clause of Section 7 extended protection to concerted activities by employees to “improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Id.* at 565. Here, the three involved employees were terminated because after they concertedly complained about the working conditions at the involved facility on April 13, Michelle Haybarker reiterated some of their complaints to Annalee Griffin at the end of July 2004, and the three employees indicated on August 12, after complaining again about working conditions and other terms and conditions of employment, that they were going to file a complaint with the North Carolina DMV. Only after this all occurred did Annalee Griffin tell the three employees that they were terminated. The possible opening or reopening of a competing office is a red herring raised by Respondent. Respondent’s citing on brief what occurred on April 30 as a partial justification for the terminations is nothing more than perpetuating a falsehood.

Regarding the latter, Respondent on brief still claims that only three employees were working on April 30, and that Annalee Griffin had no other employees available to fill in for the Haybarkers that day. Haddock testified that she and three other employees, including Taylor, worked on April 30. Taylor eventually conceded on cross-examination that she did indeed work on April 30. Shilling testified at the trial herein but she did not deny Haddock’s testimony that Shilling worked on April 30. Wells did not testify at the trial herein so she did not refute Haddock’s testimony that Wells worked on April 30. And since Taylor was a temporary employee, contrary to Annalee Griffin’s testimony, she had another employee (temporary) available to fill in that day. It is noted that since Taylor worked for the month of September 2003 for the Respondent she would have been experienced. Also, Respondent must have appreciated her work for eventually Respondent hired Taylor as a per-

manent employee. Haddock’s testimony is credited. As noted above, Jobe gave the following testimony in response to Respondent’s attorney’s question:

Q. There are no requirements imposed about how many people have to staff the office on a particular day?

A. Now, she has to make sure that there’s probably at least *four* on that counter. . . . [Tr. 113, 114, with emphasis added.]

Annalee Griffin would have been the one to arrange or at least give her permission to have Taylor, a temporary who cost the Respondent more to work than a permanent employee, to work on April 30. So she cannot claim that she was ignorant of the situation. The conclusion is inescapable that Annalee Griffin intentionally lied while under oath about what happened on April 30. The fact that Annalee Griffin never said anything to the three involved employees after April 29 about April 30 underlines the fact that it was a not an issue. Additionally, no mention of April 30 is made by Annalee Griffin in her “accurate and complete” August 20 position statement to ESC. And finally, the charge was filed herein on September 13 (GC Exh. 1(a)), and a copy of it was served on Respondent by mail dated September 13 (GC Exh. 1(b)). It reads as follows:

On or about August 12, 2004, the Employer, by its officers, agents and representatives, terminated the employees listed below because they engaged in protected concerted activities.

Robin Haybarker  
Karen Michelle Haybarker  
Kerry Haddock

Annalee Griffin testified before ESC on October 7, weeks after she was served with a copy of the above-described Board charge. Yet nowhere in her testimony does she even mention April 30 as a reason for the termination of the three involved employees (GC Exh. 5). Annalee Griffin was not a credible witness. I do not credit her testimony at the trial herein unless it is corroborated by reliable evidence.<sup>7</sup>

As Counsel for THE General Counsel points out on brief, this is an unusual case in that the showing of unlawful motivation is based in part on Griffin’s own admission (GC Exh. 4), namely her position statement to ESC which, in part, reads as follows:

When confronted with this knowledge, these three were very critical of my leadership, my management style, their salaries, and generally dissatisfied with how the office was functioning. During this conversation it became obvious that they did not have my best interest or the best interest of the office at heart. Based on this conversation and their accusations it was

<sup>7</sup> Additionally, I do not credit the testimony of Annalee’s husband with respect to either Annalee Griffin asking Robin Haybarker and his wife to work part of the day on April 30 or the alleged discussion by Annalee Griffin and her husband that the Haybarkers and Haddock should be fired over what happened on April 30. Robin Haybarker’s testimony that he was not asked to work part of the day on April 30 is credited.

obvious to me that I had no other option but to terminate their employment.

As noted above, Annalee Griffin testified that since it was going to a Government agency she wanted the statement to be accurate and complete.

Annalee Griffin also intentionally lied under oath about August 9. As noted above, in her November 9 affidavit to the Board Jobe swore that

I told [Annalee] Griffin that Robin had asked me about what it would take to open—I mean take to an open office, and then he asked if another office could be opened in Goldsboro. I told her that I told him that it would take a lot of money and that I would not approve another office in Goldsboro. I said that Robin had also inquired about the Snow Hill office being reopened, and I told Robin that the Snow Hill office was not in my territory so I could not say if it was going to be reopened. I did not tell Griffin that Robin has asked me about getting a second office in Goldsboro for himself, Michelle and Kerry because he never said that. *Robin did not tell me that he was looking to open up an office of his own or that he was looking to do so with Michelle and Kerry. I only told Griffin what Robin had asked me.* [Tr. 119, 120; and emphasis added.]

Jobe hedged when she testified at the trial herein that she told Annalee Griffin that “I *assumed* that’s who he was asking for [himself, his wife, and Haddock] [but] . . . [Robin] never came out and said he was asking for himself” (Tr. 110, emphasis added); and that “I *probably* told her [Annalee Griffin] that he was asking for himself . . . [t]hat’s *probably* what I told her” (Tr. 111; emphasis added). Subsequently Jobe testified that Robin never actually told her he was asking for an office for himself. Both the above-described portion of the affidavit Jobe gave to the Board and the next preceding sentence are the truth. The equivocal hedging Jobe did in her attempt to benefit her friend with whom she discusses personal matters behind closed doors, and from whom she allegedly purchased (at least that it what she told Robin Haybarker) a desk chair, something she apparently did not want to testify about (She testified that she was not sure what it was that Robin Haybarker helped her load into her car on August 9.), is not credited. That portion of Jobe’s November 9 sworn statement set forth above is credited. Annalee Griffin was not told that Robin Haybarker was asking about the offices for himself, she was not told that Robin Haybarker was asking for himself, his wife, and Haddock, and Annalee Griffin knew very well that Robin Haybarker, either alone or with his wife, who Annalee Griffin knew had no health insurance and major medical bills, and Haddock, who was supporting a disabled husband, was not in a financial position to open or reopen a license plate office.<sup>8</sup> One might wonder whether Annalee Griffin, who did not speak to the Haybarkers for a week because of a dream that Michelle Haybarker was killing Annalee Griffin’s family and Robin Haybarker refused

to clean up the mess, imagined, notwithstanding what she had not been told, that the Haybarkers wanted to compete with her and put her out of business. But Annalee Griffin is not claiming here that she terminated the Haybarkers because she imagined that they, along with Haddock, were trying to compete with her. Here, Annalee Griffin is testifying that Jobe *told her* that Robin Haybarker had approached her and *said he represented himself, Michelle Haybarker, and Haddock*, and he wanted to know how *the three of them* could open a second office and go into competition with her. Jobe did not tell Annalee Griffin that Robin Haybarker said he represented himself, Michelle Haybarker, and Haddock, and he wanted to know how *the three of them* could open a second office and go into competition with Annalee Griffin. As she tried to make the April 30 situation an issue when it was a not an issue, here again Annalee Griffin is trying to make the August 9 Robin Haybarker—Jobe conversation an issue when it is a not an issue. Here again, Annalee Griffin had to lie under oath in her attempt to make that which is not an issue an issue. Before August 9 Jobe had been asked by Michelle Haybarkers about the closing of the Snow Hill office. And Annalee Griffin did not refute Robin Haybarker’s testimony that before August 9 he asked her about the Snow Hill office. For the Respondent to now argue on brief that the issue is whether the thought of opening or reopening another license plate office is the concerted protected activity can be described as nothing more than a red herring. Respondent raises this as a straw man so as to be able to shoot it down. Obviously, it is not the concerted protected activity at issue. Annalee Griffin started the August 12 meeting discussing who was going to be working on the following day. Only after the three employees indicated that they were willing to file a complaint against her with the DMV did Annalee Griffin tell the three employees that none of them would not be working at the Respondent’s office the following day.<sup>9</sup>

Respondent’s assertions on brief about the paychecks are also not truthful. One might argue, as Respondent does, that Robin and Michelle Haybarker’s August 12 paychecks were final because they both were for 32 hours and not 40 hours in that they would not be working on Friday, August 13. But even if they were not terminated on August 12, the paychecks they received on August 12 would have been for only 32 hours because Annalee Griffin, when she made out the paychecks, believed that the Haybarkers were taking all of Friday, August 13 off and neither one had any paid time off left. Consequently, either way the Haybarkers would have received a paycheck for 32 hours on August 12. Annalee Griffin’s response to Robin Haybarker’s inquiry about the amount of the August 12 paycheck was nothing more than quick thinking on her part. Respondent’s argument that the paychecks to the Haybarkers and Haddock were final paychecks collapses when one considers the documentary evidence and the testimony of Annalee Griffin in response to counsel for the General Counsel’s questions.

<sup>8</sup> Jobe did not corroborate Annalee Griffin’s testimony that on August 9 she told Jobe that she was going to have to discharge the three because she did not feel she could discharge one or two and not all three because they were too close.

<sup>9</sup> The three employees were not terminated over the filing of the complaint since it was not filed until sometime after they were fired. The three employees were terminated when they indicated a willingness to file a complaint with the DMV against Annalee Griffin over complaints about their terms and conditions of employment.

More specifically, Annalee Griffin testified that that she applied 8 hours of the Haddock's sick leave *after the fact* to Friday, August 13 since she had paid Haddock for 40 hours which would have included Friday, August 13 and Haddock did not work August 13 because she was terminated on August 12; and that when she prepared the August 12 paycheck for Haddock she did not know for sure if Haddock was going to work on Friday, August 13. As noted above, after applying 8 hours of Haddock's sick leave to Friday August 13, there would have been 1.25 hours of sick leave remaining. This is what the August 20 check covered. On brief, Respondent argues that Haddock had "1 remaining sick day." (R. Br. 10.) That is not factual. On August 12, Haddock had 9.25 hours of paid leave remaining. In other words, she had more than "1 remaining sick day." And this demonstrates that Haddock's August 12 paycheck, when drafted, was not meant to be her final paycheck. If Annalee Griffin had meant it to be, she would have either included all of Haddock's 9.25 hours of paid leave or told Haddock that she was being paid for 32 hours like the Haybarkers because she would not be working on Friday, August 13, and she would receive another check later for her remaining paid leave. The paychecks when drafted were not meant to be final paychecks. The documentary evidence and both Annalee Griffin's testimony in this proceeding and her testimony in the ESC hearing on October 7 demonstrate this to be the case.

As noted above, Annalee Griffin testified as follows in the ESC proceeding:

RL: And during that conference [on August 12], did you make a final decision to terminate your employee?

AG: I did. [Emphasis added.]

The obvious question is if she did not make the final decision to terminate the three involved employees until the evening of August 12, how is it that earlier that day Annalee Griffin drafted their final paychecks. She did not. The August 12 paychecks were not final paychecks when they were drafted. Fortuitous circumstance (no paid leave remaining) accorded Annalee Griffin the opportunity to declare to Robin Haybarker that his paycheck was his final paycheck. Michelle Haybarker was in the same situation. Annalee Griffin was not so lucky, however, when it came to Haddock.

Respondent on brief requests the reconsideration of my ruling admitting General Counsel's Exhibits 4 and 5. At the trial herein, Respondent cited North Carolina General Statute § 96-4(t)(5) and (8). Paragraph (8), as here pertinent, reads "[a]ny finding of fact or law, judgment, determination, conclusion, or final order . . ." Since we are dealing with a letter to ESC from Annalee Griffin and testimony in the ESC proceeding, this section has not been shown to be relevant. Respondent argues on brief that § 96-4(t)(5) provides that all documents and testimony in ESC proceedings is "absolutely privileged . . . in any civil or criminal proceedings"; that the Board in the cases cited by counsel for the General Counsel at the trial herein, namely *Yuker Construction Co.*, 335 NLRB 1072 (2001), and *D.C. Scaffold, Inc.*, 2004 WL 1149363 (N.L.R.B. May 19, 2004), relied on *EEOC v. Illinois Dept. Of Employment Sec.*, 995 F.2d 106 (7th Cir. 1993), which held that when State and Federal statutes clash, the Supremacy Clause of the Constitution gives

the Federal statute controlling force, and Rule 501 of the Federal Rules of Civil Procedure governing evidentiary privilege law; that the Board has concluded that since a Federal question was at issue, namely, interpretation of the Act, State privilege law must yield to the Government's interest in enforcing the Act; that in *Yuker*, supra, and *D.C. Scaffold*, supra, the Board interpreted *EEOC*, supra, to preclude the adoption of any State law based on evidentiary privilege into Federal common law; that in *U.S. v. Cartledge*, 928 F.2d 93 (4th Cir. 1991), the Fourth Circuit has rejected (this case was decided 2 years before *EEOC*, supra) the Seventh Circuit's interpreting of privilege law as set forth in 1993 in *EEOC*, supra, and the Fourth Circuit held that where no controlling Federal law exists, a court may adopt an existing state privilege as Federal common law; that guided by *Cartledge*, supra, two Federal District Courts in North Carolina adopted as Federal common law (and thus applied) the very privilege at issue in this case, namely North Carolina General Statute § 96-4(t)(5), *Hartsell v. Duplex Products, Inc.*, 895 F.Supp. 100 (W.D.N.C. 1995), and *Yates v. Qincy's Restaurants, Inc.*, 1997 WL 1051845 (M.D.N.C. Dec. 17, 1997); and that in both of these Federal District Court cases, the ESC privilege was applied although a Federal question, Title VII, was involved. On brief, counsel for the General Counsel contends that an argument similar to that made by the Respondent herein was rejected by the court in *EEOC*, supra, which held that EEOC was entitled to a copy of the hearing transcript despite an Illinois State statute which made Illinois unemployment proceedings confidential; that the court in *EEOC*, supra, relied on Federal Rule of Evidence 501 which states that "the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"; that in *Yuker*, supra, the Board left undisturbed the judge's ruling that documents submitted to the Michigan unemployment agency were not privileged; that the involved North Carolina statute provides that letters and any testimony at any hearing shall be absolutely privileged in any civil or criminal proceeding and, therefore, does not apply to administrative proceedings like the Board's; that the privilege is not absolute as evidenced by the fact that once a hearing has been held anyone can request the records of a proceeding provided that they reimburse the Commission; that § 96-4(t)(1)(iii) provides that the Commission may make its records available "to any agency or public official for any purpose . . ." and (iv) "may . . . permit the use of information by public officials in the performance in the performance of their public duties"; and that if a Respondent is allowed to claim privilege for all materials submitted to ESC, Respondent could withhold all evidence in an unfair labor practice hearing and claim absolute privilege, which reading of the statute is untenable.

North Carolina General Statute § 96-4(t)(5) reads as follows:

Privileged Status of Letters and Reports and Other Information Relating to Administration of this Chapter.—All letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any

of its agents, representatives, or employees, which letters, reports, or other communication shall have been written, sent, delivered, or made in connection with the requirements of the administration of this Chapter, shall be *absolutely privileged* communication in any civil or criminal proceedings except proceedings pursuant to or involving the administration of this Chapter and except proceedings involving child support and only for the purpose of establishing the payment and amount of unemployment compensation benefits. Nothing in this subdivision shall be construed to prohibit the Commission, upon written request and on a reimbursable basis only, from disclosing information from the records of a proceeding before an appeals referee, deputy commissioner, or other hearing officer by whatever name called, compiled for the purpose of resolving issues raised pursuant to the Employment Security Law. [Emphasis added.]

The language of the last sentence of paragraph 5 has to make one wonder.<sup>10</sup>

In *Yuker Construction Co.*, supra, the Board affirmed the administrative law judge's rulings, findings, and conclusions. As here pertinent, at page 1082 Judge Schlesinger concluded as follows:

<sup>10</sup> As here pertinent, the last sentence of par. 5 reads as follows:

Nothing in this subdivision shall be construed to prohibit the Commission [ESC], upon written request and on a reimbursable basis only, from disclosing information from the records of a proceeding before . . . [a] hearing officer . . . , compiled for the purpose of resolving issues raised pursuant to the Employment Security Law. [Emphasis added.]

It would appear that the language "compiled for the purpose of resolving issues raised pursuant to the Employment Security Law" refers to the information which was "compiled" (past tense) in the ESC proceeding. The *language of this sentence* standing alone does not appear to limit the use of the purchased disclosed information. How much of a privilege exists, how confidential is the information when the language in the same paragraph which refers to "absolutely privileged" indicates that the same information can be disclosed by ESC as long as there is a written request and ESC is reimbursed for the information? Is one to conclude that the involved language means that the information can be disclosed, if ESC receives a written request and is reimbursed, but the recipient cannot use it except in the ESC matter and in child support proceedings only to establish the payment and amount of unemployment compensation benefits? Under a strict reading of the involved language it appears that a company which is not involved in the ESC proceeding could make a written request, reimburse ESC, get the "absolutely privileged" information and determine that it does not want to hire a prospective employee because of what is in the record of the ESC proceeding. Under the involved language, apparently as long as the company does not initiate a civil or criminal proceeding (obviously brought by the State), it can use the information against the prospective employee, i.e. deny the employee a job and use the "absolutely privileged" information to convince other employers in a given industry not to give the employee a job. Apparently the same would apply with respect to a union in that pursuant to par. 5 it could make a written request, reimburse ESC, and then circulate the ESC compiled information among employees to make its case that the employer's conduct is such that the employees need union representation. With respect to § 96-4(t)(5), what is the value of "absolutely privileged" in these circumstances? If the information can be disclosed in the manner set forth in § 96-4(t)(5), is it really privileged? Can the information be described as confidential? Are we dealing with a privilege or rather a limited limitation on the use of the information?

The General Counsel subpoenaed "any and all documents submitted to the State of Michigan Unemployment Agency regarding . . . [a named employee]," but Respondent . . . contended that under the Michigan Employment Security Act, M.C.L. § 421.11(b)(1)(iii) any documents used in connection with an application for unemployment benefits are prohibited from being used in a legal proceeding to which the Commission is not a party. . . . In *EEOC v. Illinois Dept. of Employment Sec.*, 995 F.2d 106 (7th Cir. 1993), the court held:

When state and federal statutes clash, the Supremacy Clause of the Constitution gives the federal statute controlling force. Rule 501 of the Federal Rules of Evidence reinforces this message in the domain of evidentiary privileges. State privileges are honored in federal litigation only when state law supplies the rule of decision. When federal law governs, as it does here, only privileges recognized by the national government matter. Because state law does not apply, Rule 501 tells us to use "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Unless we absorb the state's unemployment-insurance privilege into the common law of the United States, the EEOC's subpoena must be enforced.

Respondent gives no reason that the Michigan statute ought to undermine the right of the Board to obtain information to use in enforcing the Act. . . . I conclude that the better rule is that, where state privilege law conflicts with the enforcement of a federal statute and the privilege is not otherwise consonant with federal evidentiary law, state privilege law is not controlling. *Freed v. Grand Court Lifestyles, Inc.*, 100 F.Supp. 2d 610 (S.D. Ohio 1998)

Administrative Law Judge Gontram made a similar ruling in a Board case, *D.C. Scaffold, Inc.*, supra, adding that

Rule 501 has not been interpreted to adopt and apply state, unemployment compensation, confidentiality privileges in federal question proceedings. . . . "[W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1966) (quoting 8 J. Wigmore, *Evidence* §2192, p. 64 (3d ed. 1940)). With few exceptions, federal courts have generally declined to grant requests for new privileges. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court noted that a privilege must be strictly construed and should not be applied unless it "promotes sufficiently important interests to outweigh the need for probative evidence," citing *Trammel v. U.S.*, 445 U.S. 40, 51 (1980). The confidentiality provision of the Massachusetts unemployment compensation law does not meet this standard in a proceeding under the National Labor Relations Act such as the present case. See also *EEOC v. Illinois Dept. of Employment Security*, 995 F.2d 106, 108 (7th Cir. 1993) (where the court discounted that state's interest in confidentiality, and noted that persons who testify in state unemployment proceedings and "who know that third parties will not examine

the evidence have less to fear from telling lies—for the truth is less likely to emerge.”) The Seventh Circuit also noted that, “An unemployment-insurance privilege is no more compelling than an academic-deliberation privilege [the subject of *University of Pennsylvania v. EEOC*, supra] or a reporters-source privilege (the subject of *Branzburg v. Hayes*, 408 U.S. 665 (1972)); indeed, it is less so.”

With respect to the cases cited by the Respondent on brief, in 1991 the United States Court of Appeals for the Fourth Circuit in *United States v. Cartledge*, 928 F.2d 93 (4th Cir. 1991), was faced with a situation where the defendant was stopped by a police officer in North Carolina, allegedly for a seat belt violation, and also charged under North Carolina law with carrying a concealed weapon. Both of these charges were dismissed, and the defendant was then indicted in federal court for possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). North Carolina General Statute § 20-135.2A(a) and § 20-135.2A(d), with the following language, prohibits using evidence of the seat belt violation other than in proceedings to enforce the traffic violation: “[e]vidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on violation of this section.” *Id.* The district court granted defendant’s motion to suppress, pointing out that the North Carolina statute, which was the predicate for the stop, expressly prohibits the introduction of evidence of the failure to wear a seat belt in a criminal or civil proceeding unless the person is being tried for the traffic infraction itself; and that as the Government cannot meet its burden without the consideration of such evidence, the court must grant defendant’s motion to suppress. The United States Court of Appeals for the Fourth Circuit indicated at pages 96 and 97 that

It is not entirely clear that the North Carolina legislature created an evidentiary privilege as contemplated by Fed.R.Evid. 501. We do not resolve that question, however, because we are persuaded that even if a privilege exists, the decision whether to suppress the evidence of the seat belt is controlled by the principal announced in *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed. 2d 454 (1980). See also *United States v. Chiarella*, 588 F.2d 1358, 1372 (2d Cir. 1978) (evidentiary privilege under New York labor law does not provide privilege under Fed. R. Evid. 501).

....

In our view, a balancing of competing interests is . . . [like in *Gillock*, supra,] appropriate here. [Citation omitted.] However, the district court in the case *sub judice* did not attempt such a balancing, rather holding that the North Carolina-created privilege is one that must be *automatically* recognized under Fed.R.Evid. 501. We disagree with the district court’s conclusion on this discrete legal issue. We further conclude that a balancing of the competing federal and state interests would not support the district court’s ultimate conclusion that the testimony concerning the seat belt violation must be suppressed as an evidentiary privilege under Rule 501. The federal interest involved is, as in *Gillock*, enforcement of the fed-

eral criminal statutes. In our view, this interest outweighs any state interest which might be implicated under this statute.

In other words, the United States Court of Appeals for the Fourth Circuit did not hold that the North Carolina legislature created an evidentiary privilege as contemplated by Federal Rule of Evidence 501. As noted above, the court held that the North Carolina privilege involved there is not one that must be automatically recognized under Rule 501. And the court found that the Federal interest outweighed any state interest which might be implicated under the involved statute.

As noted above, Respondent also cites two Federal district court decisions. In *Hartsell v. Duplex Products, Inc.*, 895 F.Supp. 100 (W.D.N.C. 1995), the court, after pointing out that “Federal common law contains no privilege regarding state unemployment-benefits hearing transcripts” and citing *EEOC v. Illinois Dept. of Employment Security*, supra, applied the a balancing of competing interests set forth in *Cartledge*, supra. *Hartsell* involved a situation where the Federal court had jurisdiction over a sexual harassment claim pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (amended 1991), and also had jurisdiction over the State law claims under the doctrine of pendent jurisdiction. The court indicated at page 103

. . . practical concerns caution against applying inapposite federal and state privilege standards in the same case. A jury, theoretically, could ignore challenged testimony in considering a state claim, while considering that same testimony in assessing a federal claim. However, such an unrealistic scheme makes little sense “because the moment privileged information is divulged, the point of having the privilege is largely lost.” 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Evidence* ¶ 501[02]. Since the North Carolina statutory privilege effectively prevents this court from considering ESC testimony for Plaintiff’s state law claim, . . . the same testimony should not be imported for the federal claim. See *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 458 [(N.D. Cal. 1978).]

The court concluded that the challenged testimony was of limited probative value and that the desire to impeach witnesses does not outweigh the state interest in protecting *confidential* unemployment proceedings.<sup>11</sup>

<sup>11</sup> In *Billy R. Yates v. Quincy’s Restaurants, Inc. d/b/a Quincy’s Family Steakhouse*, 1997 WL 1051845 (M.D.N.C. 1997) the Federal court indicated, as here pertinent:

Under federal law, no privilege exists regarding testimony from a state unemployment-benefits hearing. *EEOC v. Illinois Dep’t of Employment Sec.*, 995 F.2d 106, 107 . . . (7th Cir. 1993). Although not required to do so, where no controlling federal law exists, a court may adopt an existing state privilege as federal common law. *United States v. Cartledge*, 928 F.2d 93, 95–96 (4th Cir. 1991). In deciding whether to adopt a state privilege, a court must balance the interests behind the state privilege—confidentiality—against countervailing federal interests—disclosure of probative evidence. *Id.* at 96. The Western District of North Carolina conducted such a balancing test in *Hartsell v. Duplex Prod., Inc.*, 895 F.Supp. 100, 102-03 . . . (W.D.N.C.



Just 6 years earlier the same Federal district court in North Carolina in *Walker v. Lewis*, 127 F.R.D. 466, 470 (W.D.N.C. 1989), indicated:

Where the issue is *admissibility* of evidence at *trial* which is relevant to a federal question and to a pendent state law claim, the court must apply federal privilege law. As discussed above, this is the solution proposed by the Senate [Congressional intent regarding Rule 501]. Where the federal and state law claims are being tried together to a jury, state privilege law essentially will be ignored. However, because of liberal discovery, the court and the parties can intelligently choose whether to give effect to state privilege law by severing the trial of the state law claims in federal court or dismissing the state law claims so that they can be tried in state court. . . .

Federal privilege law will apply during the trial of plaintiff's Title VII claim to the court. However, because plaintiff's state law claims will be tried to a jury independently of the trial of her Title VII claim to the court, the court can and will give effect to North Carolina privilege law.

The court in note 1 of *Hartsell*, supra at 102 indicated:

The ruling [*Cartledge*, supra] effectively overrules *Walker v. Lewis* 127 F.R.D. 466 (W.D.N.C. 1989), which held that the court must apply federal privilege when the issue is admissibility of evidence at trial relevant to a federal question and to a pendent state law claim. Moreover, plaintiff's reliance on cases in other circuits to assert a blanket application of federal privilege law is unavailing in light of *Cartledge*, which is binding authority for the court.

First, I must follow Board law. Since the Board affirmed Judge Schlesinger's above-described conclusions, they are Board law. Second, the *Hartsell*, *Yates*, and *Walker* decisions are distinguishable from the case at hand because they all involved situations where federal and state actions were being considered by the involved Federal court at the same time. That is not the situation in the instant case. The only issue being considered in this case is whether the Respondent violated Federal law, namely the Act. Third, in *Cartledge*, supra, the Fourth Circuit concluded that the district court erred in holding that the North Carolina privilege is one that must be automatically recognized under Federal Rule of Evidence 501, and the Fourth Circuit, after balancing the competing Federal and State interests involving the state evidentiary privilege, held that the evidence should *not* be suppressed, and the holding of the district court that use of the testimony was barred by Rule 501 was reversed. *Cartledge*, supra, was decided 2 years before *EEOC v. Illinois Dept. of Employment Security*, supra. As indicated

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1995). In *Hartsell*, Judge Mullen was confronted with the same issue that is before this court. . . .

....  
The court finds the analysis set out in *Hartsell* well-reasoned and persuasive. . . . With the ESC testimony, Plaintiff seeks merely to contradict deposed testimony that was obtained through extensive discovery. For the reasons stated above, the court finds absolutely privileged the ESC testimony. . . .

above, in the latter a United States Circuit Court of Appeal held that

When state and federal statutes clash, the Supremacy Clause of the Constitution gives the federal statute controlling force. Rule 501 of the Federal Rules of Evidence reinforces this message in the domain of evidentiary privileges. State privileges are honored in federal litigation only when state law supplies the rule of decision. When federal law governs, as it does here, only privileges recognized by the national government matter.

In this proceeding there is no need for the balancing of competing interests approach taken by the court in *Cartledge*, supra.<sup>12</sup> My ruling with respect to the admissibility of General Counsel's Exhibits 4 and 5 stands. Even without the Annalee Griffin's August 20 statement, which is an admission, and her October 7 ESC testimony, the record made at the trial herein demonstrates that Respondent violated the Act as alleged. Annalee Griffin is not a credible witness. Her actions with respect to certain things and her inaction with respect to other things speak volumes.

Counsel for the General Counsel, on brief, points out that Respondent did not present the testimony of Thomas, a current employee. Counsel for the General Counsel contends that, pursuant to a subpoena, Respondent presented the personnel files of all of its employees except with respect to Taylor; that as part of the personnel files, Respondent presented new hire forms for all employees except Daniel, Thomas, and Taylor; that the only documents in Daniel's and Thomas' personnel file were their job applications; that the new hire form shows the date of hire and is required to be sent to the State of North Carolina within 20 days of hire; that Respondent stipulated at the hearing that it did not provide the new hire forms of Daniel, Thomas, and Taylor or the personnel file of Taylor because Respondent could not locate them; that Respondent's assertions that those forms and Taylor's personnel file were lost are not credible given the importance of those types of records, the extremely small size of the office and the lack of turnover, and the fact that the forms were coincidentally missing for only the most recently hired employees; and that *the new hire forms and Thomas' testimony would not have supported Respondent's testimony with respect to the dates of hire* and an adverse inference should be taken against Respondent. Counsel for the General Counsel's request for an adverse inference with respect to the underlined portion of the next preceding sentence is granted. *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1154 (1994).

Counsel for the General Counsel also contends that certain of the Respondent's documents are fabrications; that none of the memoranda in the Haybarkers' or Haddock's file bear a type-written signature, and by contrast all of Geigher's notes do; that some of the Haybarker's and Haddock's memorandum are dated with only a month and a year while all of Geigher's notes

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<sup>12</sup> If the balancing of the competing Federal and State interests were undertaken here, the Federal interest involves a question of the enforcement of a Federal statute. In my view, this interest outweighs the state interest cited by Respondent in the instant case.

have the month, the day, and the year; that General Counsel's Exhibit 6 at 6 and General Counsel's Exhibit 7 at 2, purportedly written on August 9, refers to "today," and not later today but rather "later that day"; that a person writing on August 9 would not refer to events as taking place "later that day"; that Annalee Griffin used the same phrase, "Kerry will be gone" in memoranda assertedly written almost four years apart (Compare, General Counsel's Exhibit 6 at 3 and at 4.); and that Respondent manufactured evidence by attempting to create a fake paper trail, and this is further evidence of Respondent's attempts to hide the real reason for the discharges, *Chopp & Co.*, 295 NLRB 1058, 1067 and fn. 15 (1989) (phony after-the-fact paper trail). The record supports counsel for the General Counsel's contentions.<sup>13</sup>

Laura Shilling is not a credible witness. While she did not specifically deny that she, like her sister, took advantage of the fact that their mother was the Goldsboro contractor, Shilling claimed (a) that she rarely brought her children to the office, "like maybe once every couple of months, if that"; (b) that "maybe once" her children were in the office for as long as an hour; (c) that her children did not interfere with the work of the other employees in the office, she made sure of that; and (d) that no one ever made a complaint to her that her children were interfering with the work of other employees. Her mother, Annalee Griffin, testified that on April 13 the Haybarkers and Haddock complained to her about, among other things, Shilling's children sometimes being in the office and their workload being increased because of the complaints voiced on April 13. So there were complaints to her mother. The testimony of the two Haybarkers and Haddock regarding how often Shilling's children came to the office, how long they stayed, and how disruptive they were is credited. On the one hand, Shilling,

with the help of Respondent's attorney—who attempted to limit the inquiry to "in August"—tried to minimize the significance of her children being in the office. On the other hand, Shilling, like her mother, tried to leave the impression that what Respondent was dealing with was three people going to be out and the office was going to be crippled on August 13. And even after she conceded that there was only two names on the calendar for August 13 going into the August 12 meeting, Shilling took the position that if both of the Haybarkers were out it would have crippled the office, it would have been rough. Yet, Respondent does not dispute that August 13 was not an "X" day; that when Michelle Haybarker was hired her husband pointed out the obvious to Annalee Griffin, namely, that there would be occasions when as husband and wife they would both be out at the same time, and Annalee Griffin accepted this as long as it was not abused; that at least five times in 2004 two employees had been out on a given day; and that the Haybarkers explained that they were only going to be out for a couple of hours and one of the hours would be Michelle Haybarker's lunch hour. Like her mother, Shilling tried to inflate a situation which was not really an issue into an issue. She is not a credible witness. I do not credit any of her testimony unless it is corroborated by reliable evidence.

With respect to Smithson and Batson, counsel for the General Counsel on brief contends that their testimony that Annalee Griffin informed them prior to the August 12 meeting that she intended to replace the employees is not credible as their testimony does not "jibe" with the documentary and testimonial evidence which shows that Griffin made the decision to terminate during her August 12 meeting with the employees; that statements attributed to Annalee Griffin by third parties are no more persuasive than Griffin's own contrary accounts; and that both Smithson and Batson acknowledged that they were not subpoenaed to testify, they are friends of Annalee Griffin, and they have an ongoing business relationship with her. Regarding Batson, his alleged complaint actually refers only to Haddock. Batson's reference to Robin Haybarker is not specific, the individual who allegedly complained did not testify at the trial herein, and, therefore, that allegation is not entitled to any weight since it is hearsay. With respect to Batson's alleged complaint against Haddock, Annalee Griffin never told Haddock about it. Also, it is noted that according to documentary evidence sponsored by Annalee Griffin in this proceeding, she was going to replace Haddock back in 2000 (the first "Kerry will be gone"). Four years later and Haddock was still with Respondent. So what is the value of Annalee Griffin allegedly vaguely indicating that she was going to make some changes in the office which would make him happy? Batson's testimony is not entitled to any weight. With respect to Smithson, her testimony about June 11 is not corroborated by Annalee Griffin, who is not a credible witness. Similarly, Smithson's testimony about what Annalee Griffin said on August 11 is not corroborated by Annalee Griffin. Neither was offered to prove the truth of the matter asserted but rather to show Annalee Griffin's state of mind on those two occasions. Annalee Griffin herself testified more than once at the trial herein. Where the alleged declarant testifies and does not even make an attempt to corroborate alleged state of mind testimony favoring her position, how

<sup>13</sup> Counsel for the General Counsel points out that none of the memoranda, GC Exhs. 6 and 7, in Haddock's and the Haybarkers' files, respectively, was presented to the Region during the investigation stage of this case. Counsel for the General Counsel contends that this supports an inference that these memoranda were not in existence at that time. Annalee Griffin concedes that GC Exhs. 6 and 7 were not presented to the Board during the investigation. She claims, however, that she did not think that the Board requested them. If they existed at the time, would not Respondent have presented them to the Board? In his position statement to the Board, Respondent's then attorney refers to verbal complaints from customer because of the uncooperative attitudes of these three employees. Yet Respondent did not present the memoranda to the Board during its investigation. Since it was not made a matter of record what the Board requested during its investigation, the General Counsel's request for an inference on that basis cannot be granted. Counsel for the General Counsel also contends that Annalee Griffin's assertion that she had a new computer system and the fact that Shilling was a current employee does not adequately explain why vacation and sick time were not shown on the Haybarkers' and Haddock's paycheck which issued on August 12 since Shilling's paycheck printed for the same date obviously shows those balances as of that date, Haddock still had a leave balance, and zero balances also show up. Counsel for the General Counsel contends that the evidence tends to suggest that Respondent doctored the subpoenaed documents to conceal the sick/vacation time since, as shown, the employees' documents offers persuasive documentary support that the decision to terminate was made during the meeting and not before. Annalee Griffin did not adequately explain this issue raised about the subpoenaed documents.

much weight should be given to such testimony? The self-serving nature and possible falsity of state of mind of the declarant testimony goes to its weight and not to its admissibility. According to Smithson's testimony, the three employees "were going through the process of trying to open up a license tag agency." (Emphasis added.) Jobe never testified that it was her understanding that the three employees "were going through the process of trying to open up a license tag agency." (Emphasis added.) Annalee Griffin never testified that it was her understanding that the three employees "were going through the process of trying to open up a license tag agency." (Emphasis added.) If neither Jobe nor Annalee Griffin had this understanding, where did Smithson get it? Smithson's testimony conflicts with credible evidence of record. Smithson's testimony is not given any weight.

Regarding plans to hire replacement workers, counsel for the General Counsel on brief contends that it appears that at the time that Annalee Griffin arranged the interviews with Daniel and Thomas, Annalee Griffin was merely seeking a permanent employee to replace Taylor who cost the Respondent more than a permanent worker because she was a temporary worker. Respondent introduced only one exhibit, namely the Board questionnaire regarding Board jurisdiction, which is described above. With respect to replacement employees, Daniel testified but Thomas did not. As noted above, although subpoenaed by counsel for the General Counsel, Respondent did not turn over the new hire forms for Daniel and Thomas which gives the date they were hired. The only documents turned over pursuant to counsel for the General Counsel's subpoena were their applications. Respondent did not introduce their applications at the trial herein. Respondent did not turn over or try to introduce the Federal and State forms which are filled out and dated when a new employee is hired. As noted above, counsel for the General Counsel's request for an adverse inference has been granted. The testimony and documentary evidence of record does not support Respondent's assertion that it sought replacement workers for the three involved employees before the August 12 meeting.

Annalee Griffin concedes that neither of the Haybarkers nor Haddock ever received a written warning or an oral counseling. Respondent apparently takes the position that it is highly unusual for Annalee Griffin to give an employee a written warning and she could recall only doing it once in 1998. As noted above, Annalee Griffin documented a verbal counseling to Geigher on February 4, 2003 (GC Exh. 8). The same exhibit shows that (a) Annalee Griffin documented an incident on August 15, 2003, when she told Geigher never to disrespect her and use the tone of voice she had used; and (b) Annalee Griffin was going to hold a staff meeting to discuss Geigher being rude and sarcastic to a customer. General Counsel's Exhibit 20, which is information submitted to ESC regarding the termination of Geigher, contains the following:

2. On January 13, 2004 I received a telephone call from my biggest customer complaining about Tonia's rudeness and sarcastic attitude. She said that she was having trouble getting her employees to come to our office because they didn't want to deal with her. I called an im-

promptu staff meeting to discuss the importance of good customer service. I talked about the call and stressed the fact that sarcasm and facetiousness was not going to be tolerated. Tonia asked which car dealer had called and complained.

So it appears that Annalee Griffin documented at least two oral counselings and placed them in Geigher's file. Additionally, Respondent documented an oral counseling to Geigher with its submission to ESC. If Annalee Griffin held a staff meeting over Geigher being rude and sarcastic, why didn't Annalee Griffin hold a staff meeting over the alleged June 5 Batson complaint that Haddock was rude and disrespectful toward him and accused him of forgery? The above-described June 5 memorandum regarding Batson asks, "[h]ow could she [Haddock] know such a thing?" Falsely accusing someone of forgery is a serious matter. And according to the memorandum, Annalee Griffin questioned how the conclusion could be reached. One would think that if it actually happened, Annalee Griffin would want to speak to her employees and give them some guidance with respect to what is permissible in such circumstances.

On the one hand, counsel for the General Counsel has shown that the involved employees were engaged in concerted protected activity from at least April 13 to when they were terminated, Annalee Griffin knew this (And indeed with respect to August 12, Annalee Griffin herself established this regarding Haddock when she asked her on August 12 and you to.), and the concerted protected activity was the reason that the three involved employees were terminated. Annalee Griffin opened the August 12 meeting telling the Haybarkers that they both could not take Friday, August 13 off. This is hardly something someone who had already made up her mind to discharge the two Haybarkers would be saying. The testimony of Robin Haybarker and Haddock is credited regarding what Annalee Griffin said when she opened the August 12 meeting.<sup>14</sup> The timing of the terminations, immediately after all three indicated that they were considering filing a complaint with the DMV against Annalee Griffin because she was not remedying their complaints and they were not satisfied with their pay and bonuses, cannot be ignored. On the other hand, Respondent has not shown that it had any substantial and legitimate business justification for terminating these three employees. The reasons Respondent supplies for the discharges are false. In the circumstances extant here, an inference is warranted that Respondent's true motive is an unlawful one that Respondent, *in this proceeding*, desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Respondent violated the Act as alleged.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by unlawfully terminating and thereafter failing and refusing to reinstate Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock because they engaged in concerted activities for the pur-

<sup>14</sup> Additionally, there is Annalee Griffin's testimony before ESC, GC Exh. 5 at 8, namely "I asked them not to take Friday off."

pose of mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of mutual aid or protection.

3. Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

#### ORDER

The Respondent, Annalee Griffin d/b/a North Carolina License Plate Agency #18, of Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully terminating and thereafter failing and refusing to reinstate Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock because they engaged in concerted activities for the purpose of mutual aid or protection, and in order to discourage employees from engaging in such concerted activities for the purpose of mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Goldsboro, North Carolina copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 8, 2005

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaged in concerted activities for the purpose of mutual aid or protection, and in order to discourage employ-

<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees from engaging in such concerted activities for the purpose of mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock whole for any loss of earnings and other

benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Robin Haybarker, Karen Michelle Haybarker, and Kerry Haddock, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ANNALEE GRIFFIN D/B/A NORTH CAROLINA LICENSE  
PLATE AGENCY #18